

Convenor's Corner

I last reported in the December Newsletter.

COAT Conferences and AIAL Seminar

We are now on the cusp of the NSW Chapter's Annual Conference, to take place on 22 May 2009. The theme for the day is Alternative Dispute Resolution and our busy sub-committee led by Robert Quickenden has assembled a great cast of speakers.

The national COAT/Australian Institute of Judicial Administration (AIJA) Tribunals Conference, which moves between various capitals, is to be held just two weeks later, this year in Sydney. This conference also promises to be excellent with delegates coming from across the country and from New Zealand. A highlight will be the address to the conference dinner by Professor Ron McCallum, who will be known to many of you.

We are also co-sponsoring the second of the NSW Australian Institute of Administrative Law (AIAL) seminar series, on Automated Decision-Making. This event is to be held at the Minter Ellison Conference Room, Level 19, 88 Phillip Street on 11 June at 5.30 - 6.30 pm. I encourage all COAT members to support this event. Last year the equivalent seminar only drew about 20 attendees, and very few of them were COAT members. Details are included later in this newsletter.

Project on Dealing with Unreasonable Behaviour

There is a short report on this project elsewhere in the newsletter. We are expecting the Consultants' Report soon. Decisions will then be made by the Committee relating to implementation. I am hopeful we will be in a position to 'launch' the program by the time of the Annual General Meeting and Whitmore Lecture in September. As mentioned in the last newsletter, John McMillan, the Commonwealth Ombudsman, has agreed to present this year's Whitmore Lecture.

Decision writing workshops

Narelle Bell (Senior Member AAT) has taken over the organisation of the Jim Raymond workshops following the departure of Gary Byron. This year apart from an introductory workshop Narelle is also organising a refresher seminar for those who have already attended one of Professor Raymond's workshops.

Possible Initiatives

COAT NSW, I am pleased to report, is in a good position financially. We will report more fully at the NSW COAT Conference. We are in a reasonable position to consider supporting other Projects with small grants. We welcome suggestions from members.

Review of the Annual Reports

In the last Newsletter I promised a short review of some of the latest Tribunal annual reports. All cover the year to 30 June 2008.

One point is crystal clear. The States (and Territories) remain the dominant provider of tribunal services across the country.

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While its work is of great significance, the Commonwealth is a relatively small player. For example the Social Security Appeals Tribunal had about 14,000 applications, the Commonwealth Migration Review Tribunal-Refugee Review Tribunal 8,600 applications and the Administrative Appeals Tribunal 6,300 applications.

The State Tribunal environment around the country is dominated by residential tenancies (RT) business.

For example at the Victorian Civil and Administrative Tribunal there are 61,000 RT filings in a case load of 87,000 filings (70%), and here in NSW, the Consumer Trader and Tenancy Tribunal has 51,000 RT filings in a case load of 65,000 filings (79%).

Other major NSW Tribunals reported the following volumes: Mental Health Review Tribunal (10,000 reviews), Guardianship Tribunal (8,300 applications and reviews), the Administrative Decisions Tribunal (1,100). In the compulsory insurance sector, volumes reported included: Workers Compensation Commission (10,000) and Claims Assessment and Resolution Service (Motor Accidents Authority) (3,100).

If a simple cost-per-matter calculation is done dividing the number of matters into the total budget, VCAT and the CTTT with their preponderant RT element cost respectively \$360 and \$380 per matter. The main protective tribunal (NSW GT) and the main insurance claims assessment tribunal (NSW WCC) return a costing between \$1000 and \$1200 per matter. Each of them has work with special features, and, in the case of the GT, the routine practice of preparing written reasons for decision. In contrast to these examples, the Commonwealth AAT works out at \$5,400 per matter, and my own Tribunal, the NSW Administrative Decisions Tribunal, something of an equivalent to the Commonwealth AAT, works out at \$3,100 per matter.



All of the Tribunals have a member pyramid divided between full-time members and part-time and/or sessional members. In the case of the Commonwealth and the NSW high-volume tribunals, approximately a quarter of the members are full-time. Other Tribunals have a very small number of full-time members, with a substantial number of part-time members, my Tribunal being an example, 2 versus 110.

Some highlights from the overviews in the annual reports include:

- The CTTT reported that 43% of its applications (i.e. 29,000) had been lodged over the internet
- A number of the tribunals reported special community education programs, for example the CTTT has a program promoting understanding of its role in relation to tenancy and consumer claims in Aboriginal communities
- Two marked special anniversaries – the Commonwealth AAT 30 years, and the NSW ADT 10 years
- The Guardianship Tribunal referred to the shifting profile of its protected population, from mainly persons with intellectual disability to mainly aged persons with dementia
- Several of the Commonwealth Tribunals, the Workers Compensation Commission and the Guardianship Tribunal were among those that referred to implementation of professional development programs for members, and development of member appraisal protocols
- Some were involved in major legislative reviews, most notably the Mental Health Review Tribunal
- And the usual theme of doing more with less.

Judge Kevin O'Connor AM
President Administrative Decisions Tribunal NSW Convenor
COAT NSW

Annual Conference 2009 - Report

The Annual Conference is to be held on Friday, 22 May 2009 at the Menzies Hotel in Sydney. The theme of the conference is Alternative Dispute Resolution in the Tribunal context.

The Annual Conference has developed over the last 6 years as a source of up-to-the-minute information, innovative ideas, professional development and networking opportunities. It provides a chance for us to consider our roles as Tribunal members in a wider context.

This years Annual Conference promises a conference experience as equally informative and inspiring as previous years. The Conference will be opened by the Attorney General, The Honourable John Hatzistergos, MLC. Professor Hilary Astor, Professor of Dispute Resolution, University of Sydney and Inaugural Chairperson of the

National ADR Advisory Council is the Keynote Speaker and she will also participate in a panel discussion lead by Julie McCrossin. Mary Walker barrister and advocate for the ADR cause will also speak.

Commonwealth, State and Territory governments have all nominated ADR as a vital part of Tribunal justice. The implications for Tribunals and their members and for administrative lawyers are exciting and challenging. The conference will provide an opportunity for members to expand their knowledge about this important area and to consider its implications for procedure, tribunal management and professional development, among other areas.

Conference places are limited so you are urged to download a registration form and program as soon as possible (www.coat.gov.au/newsouthwales_chapter.htm) or contact Robert Quickenden or Ashleigh Adamo on (02) 9223 8088 (alternatively 0418 860 893) or write to Level 31, 52 Martin Place, Sydney NSW 2000, DX 548 Sydney.

Robert Quickenden
Barrister-at-law
Convenor Annual Conference Sub-Committee

Tribunals Leadership Conference - Report

The second COAT Tribunals Leadership Course was held in Melbourne in November 2008. The course was very well attended with 27 Tribunals represented and over 30 participants. State and Commonwealth Tribunals were involved as were a number of Tribunals from New Zealand.

Justice Michael Barker, then President of the State Administration Tribunal in Western Australia, opened and chaired the conference. The keynote speaker, Mr Michael Chaney AO, Chairman of the National Australia Bank and Chancellor of the University of Western Australia, gave an inspiring address on leadership, management and administration with practical tips on providing effective leadership.

Small group work enabled participants to discuss their particular Tribunal environments and any unique challenges they may face, as well as sharing ideas with colleagues about common issues and dilemmas. The program also addressed the training of the Tribunal members and staff, peer review, performance review and codes of conduct; the appointment and reappointment of members, remuneration issues, communicating with the community and communicating with government administrators, politicians and the media.

The conference delivered a productive environment in which participants could address some of the 'big picture' leadership issues facing them as Tribunal leaders and also allowed a 'hands on' opportunity to devise practical solutions in the company of colleagues. A very useful and effective conference!

Diane Robinson
President NSW Guardianship Tribunal



Tribunals Registrars and Managers' Conference - Report

On 26 and 27 February 2009, around 46 delegates from over 20 different tribunals from around Australia and New Zealand met together in Melbourne for the inaugural COAT Registrars and Managers' Conference.

The theme of the conference was "Tribunal Management in an Ever Changing Environment" and the aim was to provide an opportunity for Tribunal managers and administrators to improve their effectiveness, share experiences and identify best practice in a number of areas. Through a number of plenary sessions and small group discussions, participants explored a range of challenges and issues facing tribunals today, including:

- Developing effective relationships with Tribunal heads, members, host departments and ministers
- Establishing and maintaining quality processes and effective performance management systems
- Differing funding models and budget planning processes
- Effective time management

Feedback received from delegates was overwhelmingly positive, with many indicating that the sharing of ideas, the forming of networks and "knowing I am not alone" were among the best features of the conference.

Many respondents suggested that COAT consider making the Registrars and Managers' Conference an annual fixture and suggested a number of topics for future gatherings, including:

- Technology and case management systems
- Performance management and best practice
- Member training
- Staffing and organisational structures
- Streamlining processes/process mapping
- Alternative Dispute Resolution
- Vexations litigants/complaints management
- Psychology of change/managing change/project management
- Improving user compliance (reducing adjournments, non-appearances etc)

Anyone interested in being on the planning committee for the 2010 Registrars Conference should contact the secretary of NSW COAT Belinda Cassidy at bcassidy@maa.nsw.gov.au and your details will be passed on to the national secretariat.

Sian Leathem
Registrar NSW Workers Compensation Commission

NSW Administrative Decisions Tribunal - Superman or Mortal Man?

Two new "super" tribunals were born within months of one another in 1998: the Administrative Decisions Tribunal in NSW and the Victorian Civil and Administrative Tribunal. As well as amalgamating existing specialist tribunals, these two tribunals were given powers to review government decisions. While VCAT deserves the description "super" Tribunal (receiving about 90,000 applications a year), the ADT is still a mere mortal by comparison (receiving less than 1,000 applications a year).

Other 'super' tribunals in Australia include the State Administrative Tribunal in Western Australia (about 5,000 applications a year) and the relatively new Civil and Administrative Tribunal in the ACT. The Queensland government has announced its intention to establish a Civil and Administrative Tribunal in the second half of this year.

The ADT has 121 members, only two of whom are full time. The remainder, disguised as Clerk or Clerkette Kent, spend the majority of their time on other pursuits. The ADT is a very balanced tribunal with about half the members being judicial members and the other half non-judicial. There are also about the same number of women as men.

The ADT has six Divisions: three of those (General Division, Revenue Division and Community Services Division) review the merits of government decisions. An example from each Division is:

- a) a decision of the Ministry of Transport to cancel a taxi-driver's licence (General Division);
- b) a decision of the Office of State Revenue in relation to land tax (Revenue);
- c) a decision of the Department of Community Services to remove a child from the care of a foster parent (Community Services)

The other three Divisions (Equal Opportunity Division, Retail Leases Division and Legal Services Division) make 'original decisions'. The Equal Opportunity Division hears complaints about discrimination, vilification and harassment. The Retail Leases Division determines the rights and responsibilities of people who lease shops and their landlords. The Legal Services Division disciplines lawyers who have been misbehaving.

A unique feature of the ADT is its Appeal Panel. Parties can appeal to an internal Appeal Panel from decisions of the Tribunal. This allows parties to have questions of law determined without the time and expense involved in appealing to the Supreme Court. The Appeal Panel can also hear external appeals from some decisions of the Guardianship Tribunal and the Mental Health Review Tribunal.

Whether superman or mortal man, the ADT continues to fight the never ending battle for truth, justice and the Australian way.

Magistrate Nancy Hennessy
Deputy President NSW Administrative Decisions Tribunal

Case Notes on bias

Australian Securities & Investment Commission v Lanepoint Enterprises Pty Ltd [2009] FCA 258

Introduction - The respondent in this case, Lanepoint Enterprises Pty Ltd, asked that the trial judge disqualify himself and not deliver judgment in a matter where the Australian Securities & Investment Commission sought an order that Lanepoint be wound up under the statutory presumption of insolvency.

The respondent at first sought the trial judge remove himself from further hearing the matter on two grounds:

1. the trial judge had acted as counsel against Mr Norman Phillip Carey, in a case in 1980 involving several insolvent trading charges for which he was convicted. Mr Carey was a former director of Lanepoint and a witness for Lanepoint in the trial.
2. the trial judge's brother-in-law had lost a sum of money invested in a company related to Lanepoint following the collapse, several years ago, of the Westpoint Group (the parent company). This information was disclosed by the trial judge at the commencement of the third day of the trial and both parties' representatives accepted the judge's statement that he did not feel it would be an impediment to him hearing the case and did not take issue with it.

Lanepoint argued that these two matters were enough to suggest a 'fair-minded lay observer' might reasonably apprehend, that the trial judge may not bring an impartial mind to the resolution of the case, and as such should disqualify himself from further hearing the matter.

During the course of the hearing of the motion an additional matter was disclosed by the judge that was then further relied upon by Lanepoint. The judge had, as Senior Counsel before his appointment to the bench, advised a defendant in a defamation action commenced by Mr Carey. The advice was general pre-action advice and he may have settled the advice, but his Honour did not appear in court on the matter. This information was of course known to Lanepoint through Mr Carey and was never raised until the judge himself declared it.

Decision - The trial judge noted that regardless of whether actual bias existed it was 'unsatisfactory in the extreme' that the motion to disqualify was only filed a few days before the date fixed for the delivery of the judgment, saying that there was a strong public interest together with legitimate private interests that such an application be brought at the earliest opportunity. The proceedings were commenced in 2006 and heard in March 2008. There had been further hearings on other days throughout 2008.

Secondly the judge assessed whether or not an apprehension of bias could have been seen to exist based on the two matters raised by the respondent.

The respondent had argued that in the course of acting in the prosecution of Mr Carey the judge would have been exposed to a range of information and allegations against Mr Carey that would have ultimately affected the judge's perception of him. The judge held that there was no reason to conclude that he would have or even was likely to have formed an adverse opinion of Mr Carey based on a case he was involved in almost 30 years ago.

He then concluded that the fact that his brother-in-law had lost money from an investment in a related company would not, in the mind of a lay observer, give rise reasonably to the view that Mr Carey was disreputable. He said that companies can and have failed in the past despite the best efforts of competent and diligent directors. Justice Gilmore said this:

I do not consider that a fully informed fair-minded lay observer would reasonably conclude that, on either basis, I might not bring an impartial mind to the resolution of the question whether Lanepoint has rebutted the legal presumption of insolvency even if that potentially involved an adverse conclusion on my part as to Mr Carey's credibility. In neither case has the necessary first step been established, namely, the existence of facts which might lead me, as a judge, to decide the case before me other than on its legal and factual merits. Furthermore, there is no logical connection between the matters, as I have found them to be, and the feared deviation from the course of deciding the case on its merits.

Waiver - Justice Gilmore concluded that the evidence relied upon in support of all grounds raised in the application showed clearly that Lanepoint had previously waived its right to object to him hearing the case. Lanepoint did this expressly by its representatives saying so in court in response to the judge's disclosure concerning his brother-in-law on the third day of the trial and in relation to the other grounds by acknowledging that Lanepoint knew the judge had previously acted as counsel against Mr Carey (30 years ago) and in the more recent defamation suit and for months took no steps to have him disqualify himself.

He finished by saying that even if there had been no waiver he still would not have recused himself as in his opinion the test for an apprehension of bias had not been met in any of the grounds relied upon whether examined separately or together.

Conclusion - The judge ordered that the respondent's motion be dismissed with the respondent to pay the applicant's costs.

Sebel Furniture Limited v Acoustic & Felts Pty Limited (No 2) [2009] FCA 291

Introduction - Sebel Furniture is a well-known supplier of moulded chairs with a significant product in its range of furniture being a side-chair known as the 'Postura' chair. The chair was specifically designed for the education sector. Sebel Furniture is the registered owner of Trade Mark No 1054076 in respect of the shape of the 'Postura' chair.

The Respondent trades under the business name Reed Furniture. Towards the end of 2008, Reed Furniture began importing into

Australia and distributing a moulded plastic chair known as the 'Titan' chair. The intended market for the 'Titan' chair was the same educational market as the 'Postura'.

Sebel sought urgent interlocutory injunctive relief against Reeds and on 12 January Foster J determined that the applicant had made out a prima facie case for an interlocutory injunction restraining the respondent from representing in trade or commerce in Australia in relation to chairs that:

- (i) The Titan chair is the only plastic sidechair available in Australia which currently conforms to UK standards EN 1729 – Parts 1 and 2 (2006); or
- (ii) The titan chair is the first 1-piece chair that conforms to UK standards EN 1729 – Parts 1 and 2 (2006).

However he declined to grant all of the interlocutory relief that was being claimed by the applicant. In particular, he declined to grant relief based upon the argument that the respondents 'Titan' chair was deceptively similar to the applicant's trade mark.

When he made these orders on 12 January he listed the matter for further direction before him on 5 February. When the matter was called before him on 5 February, Senior Counsel for the applicant informed him that the applicant wished to make an application that he not sit as the judge hearing the final hearing of the proceedings.

The applicant suggested that the conclusions which Foster J reached in respect of deceptive similarity when determining whether there was a case for interlocutory relief, were similar, in principle, to findings of credit since both types of finding involve evaluation, impression and judgment that are peculiar to the mind of the judge making those findings.

Sebel argued that in those circumstances, there will be an appearance of pre-judgment on the question of deceptive similarity which will create an apprehension in the mind of the reasonable and rational observer that the judge may not be impartial when it comes to a consideration of these matters at the final hearing.

However Senior Counsel for the applicant stressed that there was no suggestion in any of the submissions which he made out, that the judge would not, in fact, be impartial in conducting the final hearing of the proceedings.

The respondent argued that there is no principle of law to the effect that a judge who expresses views in deciding an interlocutory application about matters of impression should not hear the same proceedings on a final basis and that the principles concerning disqualification on the ground of apprehended bias have no application in the present circumstances.

Reed also argued that judicial officers are under a duty to hear and determine matters allocated to them and that they should not too readily accede to applications for disqualification, otherwise litigants may succeed in effectively influencing the choice of the judge in their own cause by sidelining a judge who the particular litigant may

see as likely not to determine the case favourably to them.

Finally they argued that there is no suggestion by either parties of actual bias in the present case, and as a result of all these circumstances, the reasonable bystander would not apprehend bias in the form of pre-judgment in the issues to be determined in the final hearing.

However the day before judgment was set to be delivered the applicant's solicitors sent an email to Foster J as well as to the defendant informing them that they wished to discontinue the trade mark infringement parts of their claim, but did not mention that they intended to discontinue the current application, even though their arguments for apprehended bias were only relevant to the parts of their claim related to the alleged trade mark infringement.

Decision - Foster J acknowledged that the applicant had expressly disavowed any suggestion that he was actually biased against the applicant or that his mind had been made up in advance of the final hearing. He went on to say that applications of this type are made by parties, ostensibly in the interests of justice, because they fear that continued participation on the part of that particular judicial officer may lead to perceptions in the mind of the hypothetical independent observer that the judicial officer may not bring an independence and impartiality to the issues to be heard and determined by him.

He began by examining previous cases and stating the test for disqualification set out in *Ebner v Official trustee in bankruptcy*:

"...a Judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."

He then quoted observations made by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Johnson v Johnson* regarding this test:

"... two things need to be remembered: the observer is taken to be reasonable; and the person being observed is "a professional judge whose training, tradition and oath or affirmation requires the judge to discard the irrelevant, the immaterial and the prejudicial".

He then moved on to a statement made by Mason J in *Re JRL*; ex parte CJL at [352]:

"It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions



provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way."

After examining various cases and outlining what apprehended bias would be and the tests for finding it, Foster J acknowledged that the removal of the trade mark infringement sections of the applicants original claim, also removed the question of apprehended bias because it was only in relation to those parts of the claim that the alleged apprehended bias could have existed.

He ruled that the application be refused and that the costs of that application be the respondent's costs in the proceedings.

Matt Laidley
For Belinda Cassidy
Principal Claims Assessor, Claims Assessment &
Resolution Service

Professor James Raymond Decision Writing Workshops

"Brilliant!"

"Enjoyed every minute! Most instructive and informative and a wonderful guide for the future."

"Excellent value!"

"Jim is a great presenter – putting our work in its context and giving real guidance on how to take it to the next level."

"Now I can enjoy writing my decisions."

"By far the best professional development I've ever done."

These are just a few of the comments from participants in last year's COAT NSW decision writing seminars presented by Professor James Raymond.

Professor Raymond is an internationally known legal writing consultant who works all over the world teaching judges, tribunal members and lawyers to reason and write better and more effective judgments, decisions and submissions. He is well acquainted with Australian jurisdictions and understands very well the particular challenges facing tribunal members.

COAT NSW Chapter will sponsor these very popular seminars again in 2009 – but this time we are taking it a step further.

In addition to the usual introductory workshop, Professor Raymond will present an advanced seminar for those who have already completed the basic seminar and want to take their decision writing to the next level.

The basic seminar will have practical writing exercises based on techniques for organising complex material, analysing issues and presenting decisions in the most persuasive way with attention to style and clear language.

The advanced seminar will provide a brief refresher of the points covered in the first seminar, introduce participants to some new ways of working with issues and analysing questions of law and fact, and take a closer look at style. Professor Raymond's advanced seminars have enjoyed great success in Australia and overseas.

Dates for the seminars are:

Basic seminar: 23 and 24 September, 2009

Advanced seminar: 28 and 29 September, 2009

The seminars will be held at the premises of the Administrative Appeals Tribunal, Level 5, 55 Market Street, Sydney (near the State Theatre).

The total cost of the seminar will be \$1,595, which includes all tuition, materials, morning tea, lunch and afternoon tea.

Each seminar will accommodate just 14 participants – so be quick to secure your place!

Further information about the seminars and an application form will be circulated to COAT members shortly. In the meantime, if you are not a COAT member or if you just can't wait, please contact Narelle Bell by phone (9391 2422) or e-mail (Narelle.Bell@aat.gov.au) for further information.

Narelle Bell
Senior Member Administrative Appeals Tribunal

Book Review "Tribunals in the Common Law World", Editor Robin Creyke (The Federation Press, Sydney, 2008)

With the rise of the welfare state from the 1920s onwards, Western liberal democracies needed to develop new systems for dispute resolution.

Traditional courts with their focus on the adjudication of criminal charges and the adjudication of disputes over private property and private harms were often not seen as best suited to the new dispute resolution universe.

New mechanisms were designed to deal with disputes arising out of the state guarantees in such areas as pensions, social insurance, immigration and access to public housing; and to uphold community protection objectives as in, for example, disciplinary action against members of regulated occupations and regulated professions.

Australian law courses of the 1960s and earlier paid little attention to the growth and place of tribunals. A subject squarely called 'Administrative Law' only entered the curriculum of the major law schools at the end of the 1960s. Soon after, we saw at the Federal level, the development of a sweeping new administrative law framework.



We now see the Tribunal model employed beyond the field of citizen-state disputes. In the States and Territories, Tribunals deal, in addition, with private law disputes and matters with a human rights dimension (as in equal opportunity and the protective jurisdictions).

At the forefront of Australian administrative law scholarship since the 1970s have been two ANU professors, Robin Creyke and John McMillan. Robin is the editor of this collection of essays, and John is a key contributor.

The collection has its origins in an international workshop held at the ANU in 2006. The essays have been revised and updated. They deal with key issues for Tribunals in the 'common law world', i.e. the United Kingdom and its Commonwealth cousins, Canada, Australia and New Zealand.

There are two federal countries and two unitary countries. There are 12 individually-authored essays, three apiece from the four countries. The main themes are: procedural fairness in tribunals; fact-finding in tribunals; the consideration of government policy by tribunals; and future directions for tribunals.

The essays are introduced by a conspectus essay by four persons holding very senior posts in the world of tribunals in each of the four countries. The Australian contributor to the conspectus essay is Justice Garry Downes, President, Commonwealth AAT, and, of course, a former President of COAT.

The individual Australian contributors are Dr Gabriel Fleming (Tribunals in Australia: How to Achieve Independence), Stuart Morris QC (Tribunals and Policy) and John McMillan (Administrative Tribunals in Australia – Future Directions).

The book is introduced by an Overview written by Tom Smyth, an assistant editor, with a short Foreword from Robin Creyke.

My only disappointment with the choice of authors is that there is no essay from Robin herself. In her academic work, in her sterling contributions to so many administrative law conferences and in her membership of key institutional bodies, she has had a profound influence on administrative law in Australia.

Many of our Tribunals in Australia have filtering arrangements before a dispute can reach the hearing stage (for example, primary decision by the agency, compulsory reference to conciliation or mediation). On the other hand, a strong-willed party can decline to participate genuinely in those stages and press the matter through to hearing, then draw that process out through interlocutory appeals and at the end of the day, further appeals and judicial review applications. These possibilities derive from the 'rights' based model of Tribunal systems, drawing on the Court analogue.

The most interesting aspect of the essays for me was the discussion by two United Kingdom scholars (Michael Adler, Nick Whiteley) of the thinking found in the UK White Paper of 2004. The White Paper was the official response to the Leggatt Inquiry recommendations. The Paper commended the idea of 'Proportionate Dispute Resolution'. This model of tribunal justice imposes filters and barriers with the

aim of only allowing 'strong' cases to proceed to a court-style final determination. The 'weak' cases are weeded out, even if those concerned would have been satisfied with less than a full hearing'. Further, a litigant in person with a 'strong' case would be eligible for a grant of legal aid. In this way the legal aid budget would reach cases that may have an important public interest dimension (see Adler, pp 173-174).

This discussion also notes that some have proposed that tribunals adopt 'triage' procedures being adopted in hospitals. The term's main dictionary meaning is 'the sorting at the battle front of casualties according to the urgency of treatment required'!

Another contribution of the White Paper has been to promote greater attention by Government to the 'bottom up' model of 'administrative justice' as distinct from the 'top down' model. The Australian federal model is very much an example of the 'top down' model. This may also be said, I think, of the Victorian tribunal model and of the ADT in New South Wales which I head.

The danger of the 'top down' model is that less than satisfactory practices will persist at the coal face of administrative decision making. The administrative agency will simply 'risk manage' the possibility of an external review proceeding. In turn, it may give minimal attention to the systemic implications of the review tribunal's decision. The White Paper supports the implementation of measures that address administrative decision-making standards at the coal face. This is not a simple matter, of course (see again Adler, pp 162-163; Wikeley, pp 181-185).

The United Kingdom, Canada and New Zealand have a common element largely missing from the environment of Australian tribunals – an overarching domestic law guaranteeing the protection of human rights. In the UK's case it is augmented by the European Convention on Human Rights. Penny Letts (UK), Heather McNaughton (Canada) and Ema Aiken (NZ) refer to the influence of human rights laws on decision-making by tribunals.

The examples given, especially from the UK, show how overarching human rights standards can operate practically in the tribunal environment, and how they can be interpreted and applied in a sensible way. I note that in the latest annual report of VCAT, its President referred to the place of the Victorian Charter of Rights and Freedoms in that Tribunal's work.

Several of the essays refer to the 'integrity' branch of government as a fourth branch alongside the traditional three branches, the legislature, the courts and the executive. John McMillan, presently the Commonwealth Ombudsman, places in the integrity branch the various statutory oversight commissioners (which include his own office and an office I once occupied, that of Privacy Commissioner), human rights commissions and the anti-corruption bodies.

John also comments on, what he sees as, the lack of insight shown in some of the higher court decisions dealing with tribunals. He expresses concern over the 'legal straitjacket' imposed on tribunals (p 237). As one example, he questions the rigidity of the court standard in regard to procedural fairness that requires any adverse



information known to the Tribunal to be exposed to the person affected. He questions whether so strict a standard should apply in the working environment of tribunals, especially inquisitorial tribunals. In his view 'procedural fairness in an administrative setting must be combined with discretion and good sense' (p 233).

The conspectus essay and the individual essays allow the Australian reader to compare and contrast different countries' approaches to substantive issues such as: the fair hearing rule, the bias rule and fact finding. The same applies to vexed institutional issues such as: super-tribunals, appointment and reappointment practices, performance assessment of tribunal members, membership structures, improving professional standards, front-end integration of registry services, budget, entrenching the independence of tribunals and defining the accountability relationship with government.

These essays provide numerous thoughtful insights into the issues faced today by justice policy makers and the tribunal community.

Judge Kevin O'Connor AM
President Administrative Decisions Tribunal NSW Convenor
COAT NSW

Other COAT Activities

Unreasonable Conduct Project

COAT (NSW) has contracted with Ms Meredith Martin and Ms Mary Ellen Bourke to produce a training manual and facilitator's manual designed to train Tribunal Members in the art (and perhaps the science) of dealing with unreasonable conduct. We are expecting the manuals to be available by the end of May.

The next stage will be to determine how, when and who will implement this training across Tribunals in NSW. Hopefully the training will be delivered during 2010 and on an ongoing basis.

Thanks to all the larger Tribunals who assisted Ms Martin and Ms Bourke in the initial stages of this project. We may require your assistance again during this phase.

AIAL Evening seminar series

The New South Wales Chapter of the Australian Institute of Administrative Law is again presenting its 2009 Seminar Series as follows:

7 May 2009 Administrative law Implications of the Commonwealth Emissions Trading Scheme (in Conjunction with the National Environmental Law Association).

Chair Justice Beazley AO

Speakers Melissa Perry QC, Matthew Bairds, Barrister and Ilona Millar, Senior Associate Baker and McKenzie

Location Blake Dawson Lawyers – Level 36 Grosvenor Place, 225 George Street Sydney

11 June 2009 Administrative Law Implications of Automated Decision-making (in Conjunction with the COAT NSW Chapter).

Chair Judge Kevin O'Connor

Speakers Jillian Segal AM, President of the Administrative Law Council; Robin Creyke, Professor of Law, Member of the Administrative Review Council

Location Minter Ellison Lawyers – Level 19 Aurora Place, 88 Phillip Street Sydney

2 July 2009 Implicating Administrative Law in the Human Rights Debate: Bills of Rights and the NT Intervention (in conjunction with the Administrative Law Section Group of the New South Wales Bar Association).

Chair Stephen Lloyd QC

Speakers Ronald Merkel QC; Edwatr Santow, Senior Lecturer.

Location Minter Ellison Lawyers – Level 19 Aurora Place, 88 Phillip Street Sydney

All seminars commence at 5.30 pm and conclude at 6.30pm. Each seminar costs \$20 per person and all three cost \$45 per person. For registration and other details contact Pam Madafiglio at Minter Ellison Lawyers on 9921 4038.

Belinda Cassidy
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