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From the Editor

Welcome to the first COATnews for 2010, the first of our new format electronic bulletins. I trust you will find this e-bulletin interesting and accessible.

Thanks must go to Belinda Cassidy for her extraordinary effort in producing COATnews and also to Bob Quickenden for his learned contribution to the newsletter sub-committee.

We aim to issue a COATnews electronic bulletin every 2 months. If any member would like to contribute or provide feedback please contact me at diane.robinson@gt.nsw.gov.au or Belinda at bcassidy@maa.nsw.gov.au.

Diane Robinson – Vice Convenor COAT NSW Chapter and chair of the newsletter subcommittee.

Convenor's corner

The conference season for tribunals is about to start.

The NSW Chapter is holding its annual conference on Friday 7 May 2010 at the usual venue, the Menzies at Wynyard. Full details are given elsewhere in this Newsletter. Our keynote speaker will be NSW Supreme Court judge, Justice John Basten, who, as many of you know, spent much of his career as a barrister in and around the world of tribunals.

The joint Australian Institute of Judicial Administration/National COAT Conference is to be held in Brisbane on Thursday 10 and Friday 11 June 2010 at the Mercure Hotel. The conference program has been finalised, and is available at www.aija.org.au. It too promises to be a good one. The opening address will be given by the incoming Chief Justice of the Federal Court, the Honourable Patrick Keane.

As I noted at last year's annual general meeting, the membership of the NSW Chapter has drifted downwards over the last few years, from a peak of around 200 now to about 160. May I ask members to encourage their colleagues who are not members to consider joining. The annual fee is small. There are several hundred Tribunal members belonging to NSW State tribunals and the NSW divisions of Commonwealth tribunals. When it comes to such matters as making submissions to government on issues of concern, or in bidding for external support, our credibility and standing as an organisation is judged partly by reference to the number of members we have. More importantly, our aims and activities are ones that should attract the interest of all members of tribunals in NSW.

As you know, the NSW State tribunal structure continues to be a disaggregated one, in contrast to the choices made in Victoria, Western Australia and Queensland, where 'super tribunals' have been established. The Commonwealth has several separate major tribunals. The Howard government tried to establish a super tribunal in the form of the 'Commonwealth Administrative Review Tribunal'. That proposal met with strong and justified criticism, in particular because of the way it diminished judicial independence in its structure.

Two weeks ago the Victorian government released the Report of the review undertaken by the VCAT President, Justice Bell, on the operations and performance of VCAT in its first 10 years of existence. The report can be downloaded from the VCAT review web site www.vcatreview.com.au.

Many of the themes of the report cover issues we have all struggled with. VCAT has about

The report recommends the development of a self-represented persons strategy. It calls for a litigant in person co-ordinator, an expanded pro bono legal service and the creation of a self-representation civil law service.

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90,000 filings a year, and its remit embraces the jurisdictions held by all the major State tribunals in NSW (apart from Mental Health) plus that held by the Land and Environment Court. There was a public consultation process involving community meetings. Community concerns are crystallised under headings in the report that include: 'creeping legalism', 'not sufficiently assisting self-represented parties and non-lawyer advocates', 'clubby atmosphere at some hearings', 'inconsistency in procedure and result', 'no formal complaints mechanism', 'lack of internal appeal tribunal', 'need for plain English forms and correspondence', 'lack of public education'.

The Bell Report divides its key findings into: Access issues, Operational issues and Jurisdictional issues. It then moves on in Part Two of the Report to the theme of 'Envisioning the Next Decade'. Key ideas are: that VCAT should have a much stronger profile in outer suburban and regional areas of the State, with its own street front presence and hearing rooms; develop significantly its electronic platform; have an internal appeals facility to provide oversight, consistency and predictability in relation to interpretations of the law and case outcomes (the problem of the wilderness of single instances); strengthen its complaints and public accountability mechanisms; and have a balance of full-time, sessional and part-time members.

The report recommends the development of a self-represented persons strategy. It calls for a litigant in person co-ordinator, an expanded pro bono legal service and the creation of a self-representation civil law service. It calls for the establishment of an ADR management stream headed by an ADR judge. It raises possibilities such as early intervention mediation, telephone mediation and roving mediation.

The recommendations are before the government. Justice Bell is now returning to the Supreme Court, and the new President of VCAT is to be Justice Iain Ross.

Last Monday, 8 March, the Senior President of UK Tribunals, Lord Justice Robert Carnworth, addressed a meeting that I attended along with a number of other COAT members. The UK now has its own 'super tribunal' structure. He told me that the annual intake is about 600,000 matters a year, with almost 200,000 being social security appeals filings.

Tribunals are grouped into clusters known as 'chambers'. There is an overall division of the clusters into two 'tiers', the lower tier covering jurisdictions that might be seen as less complex with the upper tier covering jurisdictions that might be seen as more complex. The headship arrangements reflect this distinction, with three of the four upper tier chambers being headed by superior court justices and all seven lower tier chambers being headed by lower court judges. There is a facility for reconsideration of decisions at each level, a filtered internal appeals relationship between the lower tier and the upper tier, with a further narrow right of appeal to the Court of Appeal. There is a common front-of-house registry service ('the Tribunals Service'), with the intake streamed after that to the appropriate chamber and tribunal.

To the mild astonishment, I think, of some of the equity judges and barristers in the room, we heard that a significant part of the jurisdiction of the High Court of Justice in Chancery was now handled in the 'Tax and Chancery Chamber' of the Upper Tribunal! (See further, *Kirk v Industrial Relations Commission* [2010] HCA 1, per Heydon J at [122]).

Lord Justice Carnworth referred with bemusement to the strictness of the distinction drawn in Australia as between courts and tribunals. As we know, it is a rigid distinction at Commonwealth level. It bedevils State tribunals when they have to deal with disputes to which Commonwealth law is relevant. Basically State tribunals can not apply and enforce Commonwealth law. This gives rise to the possibility that cases may have to be split or removed to the more costly and complicated environment of the State courts – the constitutionally permissible receptacles of Commonwealth law.

He referred to the UK's policy of treating all judges of the ordinary courts and members of tribunals as engaged in essentially the same task. The result is universality in the arrangements that apply to such matters as appointment processes, complaints and discipline, and education and training. We remain in Australia a long way removed from, what I see as, the maturity of government and judicial thinking reflected in the UK policy.

Here at State Chapter level, our major project reaching fruition is the implementation of the

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The Minister for Immigration and Citizenship ... announced the appointment of Amanda MacDonald as deputy principal member of the ...MRT and the ...RRT.

Training Package on Dealing with Unreasonable Conduct. The Package has been finalised, and the presenters have been engaged - Meredith Martin and Mary-Ellen Burke. The Package deals with issues arising for members in hearings. We have in mind a workshop model of 20 participants. We will be circulating information to heads of tribunals, and will be looking for their active support for this initiative.

Judge Kevin O'Connor, Convenor, COAT NSW Chapter.

Appointments and Awards

Gary Byron AM

On 26 January 2010 Gary Byron, our former secretary and then vice convenor was made a Member of the Order of Australia (AM). Gary was recognized for his service to court administration, particularly through executive and administrative roles.

Veteran's Review Board Head

The Minister for Veterans' Affairs the Honourable Alan Griffin has announced that Doug Humphreys has been appointed as the Principal Member of the Veterans' Review Board for five years, beginning on 22 March 2010.

The Veterans' Review Board is an independent tribunal that reviews decisions or determinations of the Repatriation and Military Rehabilitation & Compensation Commissions. The Veterans' Review Board also reviews determinations of the Service Chiefs of the Navy, Army and Air Force in relation to rehabilitation for serving members of the Defence Force. The Veterans' Review Board is the first avenue of appeal for decisions about veteran's benefits and entitlements, after internal review options have been exhausted. Veterans' Review Board decisions can be appealed to the Administrative Appeals Tribunal.

As all of you will know, Doug is an experienced senior public servant with an extensive background in government tribunals. He is currently the Principal Registrar of the Commonwealth Administrative Appeals Tribunal, a position he has held for the past six years. He is also a Member of the Council of the Law Society of NSW and an alternate member of the NSW Legal Aid Commission Board, and he has served as an infantry officer in the Army Reserve since 1976.

New senior appointment to review tribunals

The Minister for Immigration and Citizenship, the Honourable Senator Chris Evans, recently announced the appointment of Amanda MacDonald as deputy principal member of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT). Ms MacDonald is currently a senior member of the tribunals. She joined the MRT in 2001 and was cross-appointed to the RRT in 2006.

During 2007-08, she was also a senior member of the Veterans' Review Board. Earlier in her career, she spent three years as a district registrar and conference registrar of the Administrative Appeals Tribunal and 13 years as a member and registrar of the Social Security Appeals Tribunal. Ms MacDonald holds a Masters of Administrative Law and Policy from the University of Sydney.

Jones v Ekermawi

[2009] NSWCA 388 – case note Robert Quickenden

Mr Ekermawi lodged a complaint with the NSW Anti-Discrimination Board against a broadcaster (Mr A Jones) and a licensed radio station (2GB). The complaint was that Mr Jones racially vilified people of the Muslim faith or of Middle Eastern or Arabic background in contravention of section 20C of the *Anti-Discrimination Act 1997* ("the Act"). The program was broadcast in December 2005 when civil unrest had occurred at Cronulla Beach, NSW.

The President of the Anti-Discrimination Board dismissed the Mr Ekermawi's complaint primarily because the broadcast in context did not meet the objective test for incitement required by section 20C. Mr Ekermawi was self represented and sought leave to proceed with the complaint from the Administrative Decisions Tribunal (Hennessey D.P) pursuant to section 96 of the Act. Leave was refused as Mr Ekermawi had not satisfied the test

The Supreme Court found the ADT had not applied the correct test for a leave application pursuant to section 96.

requiring an applicant to show a “substantial reason” for the grant of leave (*Xu v Sydney West Area Health Service* [2006] NSWADT 3).

There is no statutory right of appeal from the ADT’s decision so Mr Ekermawi sought judicial review of the ADT’s decision pursuant to section 69 of the *Supreme Court Act 1970*. In the New South Wales Supreme Court (Schmidt J *Ekermawi v Administrative Decisions Tribunal of NSW* [2009] NSWSC 143) quashed the ADT’s decision for failing to apply the correct test for a leave application and failing to satisfy procedural fairness requirements.

The Supreme Court found the ADT had not given procedural fairness to Mr Ekermawi because it had not alerted Mr Ekermawi to his own misunderstanding of his opponent’s case in circumstances where the Court was satisfied that the ADT was aware of Mr Ekermawi’s misunderstanding. Further, the ADT should have sought submissions from Mr Ekermawi based upon the correct understanding. Mr Ekermawi wrongly believed the broadcaster conceded the broadcast constituted racial vilification and all that the ADT was to consider were other factors relating to the grant of leave. The other factors included what steps 2GB had implemented to redress racial vilification in its broadcast. As a result, the Court found 2GB had not adequately responded to a direction by the ADT that 2GB provide information to Mr Ekermawi and therefore Mr Ekermawi had not been given sufficient opportunity to address these matters which were relevant to the ADT’s test as to whether leave should be granted.

The Supreme Court found the ADT had not applied the correct test for a leave application pursuant to section 96. Nothing should be read into the broad discretion granted by the section. The test was a more general one requiring the complainant to show that it is “fair and just” that leave should be granted applying *Salido v Nominal Defendant* (1993) 32 NSWLR 524. The New South Wales Court of Appeal (*Jones v Ekermawi* [2009] NSWCA 388) agreed with the Supreme Court on the procedural fairness issue and acknowledged the force of the test found by the trial judge without making that test part of the ratio decendi of the decision.

British American Tobacco v Laurie & Ors [2009] NSWCA 414 – case note Robert Quickenden

The first respondent alleged her husband had contracted terminal lung cancer from smoking the appellant’s cigarettes. Further, the appellant knew this would cause smokers harm but failed to give any warning. Proceedings were originally commenced by the first respondent in the Dust Diseases Tribunal against a number of defendants.

The first respondent pleaded the appellant had, pursuant to a document destruction or retention policy, intentionally destroyed documents that tendered to prove its knowledge tobacco products caused lung cancer; with the intention of placing those documents beyond the reach of potential litigants.

During interlocutory proceedings in the DDT in 2006 in a case involving Brambles and British American Tobacco, Curtis J was required to determine whether the appellant should give further and better discovery. An issue in that application was whether Brambles could adduce otherwise privileged evidence to the effect that British American Tobacco had destroyed prejudicial documents for the purpose of suppressing evidence in anticipated litigation. Curtis J had, in those earlier proceedings admitted this evidence on the basis that it constituted communications “*in furtherance of the commission of a fraud*” within the meaning of s.125(1)(a) of the *Evidence Act 1995*.

The Laurie claim was listed for hearing before Judge Curtis and he was asked by British American Tobacco to disqualify himself. Curtis J refused and it was that decision that was the subject of an application to the Court of Appeal.

There are three issues of interest to Tribunal members:

1. Apprehended bias including apprehended bias by reason of pre-judgment.
2. The relevance of a judge’s explanation of material which potentially discloses apprehended bias.
3. The factors to which the fair minded lay observer is assumed to have regard.

The majority (Tobias JA and Basten JA) found a fair minded lay observer would not reasonably apprehend that the primary judge might not bring an impartial and unprejudiced mind to whether the applicant had committed a fraud as a result of his interlocutory judgment.

Apprehended Bias including Bias by reason of pre-judgment

The majority (Tobias JA and Basten JA) found a fair minded lay observer would not reasonably apprehend that the primary judge might not bring an impartial and unprejudiced mind to whether the applicant had committed a fraud as a result of his interlocutory judgment. An applicant would have some difficulty in demonstrating a reasonable apprehension of bias on the basis of an earlier determination of a judge where the earlier determination was made on an interlocutory basis. The Tribunal permitted re-agitation of the same issue which had not been determined on a final basis, once all relevant admissible evidence had been elicited at trial. The early determination was not accompanied by any objectionable or emotive language or expressed emphatically in terms of absolute finality so as to cast doubt on the willingness or ability of the judge to reconsider objectively the position earlier adopted. The early determination was expressed in qualified and guarded terms.

His Honour Allsop P dissented. His Honour found the interlocutory judgment did create an apprehension of bias. The finding of fraud was not qualified nor made provisional by virtue of the fact that it was reached on an interlocutory stage of the proceedings and based only on the evidence admitted up until that time. Further, when a judge reaches a state of actual persuasion of the moral delinquency of a party to a degree warranting the grave and express conclusion of fraud, a fair minded lay observer might reasonable think that a judge might not be able to eradicate the effect of this conclusion from his or her mind in attempting to deal impartially with the same issue on a later occasion.

Relevance of judge's explanation of material which potentially discloses apprehended bias

Again the majority (Tobias JA and Basten JA) found the subsequent explanation by the judge of an earlier statement may be taken into account by the reasonable fair minded lay observer in determining the effect of the earlier statement. However, a fair minded lay observer need not be expected to accept such a disclaimer.

Factors to which the fair minded lay observer is assumed to have regard

Hearsay evidence is admissible in an interlocutory application but inadmissible in other circumstances.

Findings based upon such evidence are made for the limited purpose of allowing inspection of documents which would otherwise be the subject of client legal privilege.

Would take into account procedural characteristics of the particular tribunal in which the proceedings were brought including the statutory scheme under which the Tribunal operates and the rules of procedural fairness.

Notwithstanding the majority judgment caution should be exercised in preliminary or interlocutory proceedings when the Tribunal member(s) is likely to determine the final hearing (*Rustom v Ismal* [2009] VSC 625). In *Rustom* a member of the Victorian Civil and Administrative Tribunal found a builder must pay an owner \$99,393.09 pursuant to a residential building contract. The builder was unrepresented. The Tribunal member had made adverse credibility findings against the builder in earlier, separate and unrelated proceedings. The Tribunal member made statements at the beginning of the hearing about not being actually biased against the builder. The Victorian Supreme Court (*Cavanough J*) found that actual bias was not the test for reasonable apprehension of bias. The Judge reluctantly upheld the claim for reasonable apprehension of bias notwithstanding the Tribunal hearing had been for 15 days and the Tribunal member provided thorough reasons.

It is understood an application for special leave to the High Court has been lodged in the British American Tobacco case.

Kirk v Industrial Relations Commission: Kirk Group Holdings P/L v Work Cover Authority NSW [2010] HCA 1 (3 February 2010)

Jurisdictional error has been a mechanism Superior Courts have used to control error by inferior courts and Tribunals in circumstances where there has been no statutory review

In Kirk the High Court maintained the distinction between jurisdictional and non jurisdictional error it referred to in Craig.

path to do so (*Craig v South Australia (1995) 184 CLR 163*).

In *Kirk* the High Court maintained the distinction between jurisdictional and non jurisdictional error it referred to in *Craig*.

An employee of Mr Kirk's company had sustained fatal injuries when a 4WD ATV he was driving overturned on a slope. Mr Kirk had been successfully prosecuted pursuant to the criminal provisions of the *Occupational Health and Safety Act (NSW) 2000*.

Most Tribunals are not governed by the rules of evidence. In *Kirk* the High Court found a failure to comply with a rule of evidence amounted to jurisdictional error (as well as being an error of law). The Industrial Court's jurisdiction was to decide the guilt or otherwise of the accused in accordance with the rules of evidence. The Court had erred in admitting evidence from the accused therefore the rules of evidence had not been adhered to and the Court had gone beyond its power thereby committing a jurisdictional error.

Administrative decision makers are more likely to make jurisdictional errors than a Court. This is because errors of law made by Courts are more likely to be categorised as an error within jurisdiction.

The High Court in *Kirk* found State legislatures cannot legislate to exclude jurisdictional error review by State Supreme Courts. State privative clauses therefore have significant limitations. The basis for the High Court's finding was that the structure of the Commonwealth Constitution provides for State Superior Courts to have functions which include correcting jurisdictional error by State inferior Courts and Tribunals.

Decision Writing Seminars

For the last 4 years COAT has sponsored decision-writing seminars for tribunal members led by Professor James Raymond. These seminars are held over two days and are a wonderful way to improve both the way your decisions are written and your efficiency in decision-writing.

COAT is currently canvassing interest for workshops to be held in August/September 2010. If you are interested in attending a two day decision writing seminar please contact Narelle Bell. The committee is also keen to explore whether tribunal members who have attended one of Professor Raymond's past workshops would be interested in a one day refresher workshop. Narelle can be contacted by email at Narelle.Bell@AAT.GOV.AU

Tribunal Vacancies

The Motor Accidents Authority's Medical Assessment Service will soon be advertising for Medical Assessors. Interested persons should keep an eye on the MAA's website, www.maa.nsw.gov.au.

Committee NSW Chapter of COAT

Convenor	Judge Kevin O'Connor AM President, Administrative Decisions Tribunal
Vice Convenor	Diane Robinson President, Guardianship Tribunal
Secretary	Belinda Cassidy Principal Claims Assessor, Claims Assessment & Resolution Service
Treasurer	Bruce MacCarthy Senior Member, Refugee Review Tribunal & Migration Review Tribunal
Committee	Sian Leathem Registrar, Workers Compensation Commission Robert Quickenden Assessor, Claims Assessment & Resolution Service Legal Member, Guardianship Tribunal Magistrate Nancy Hennessy

Deputy President, Administrative Decisions Tribunal
Sue Crosdale

Senior Member, Refugee Review Tribunal & Migration Review Tribunal

Joanne Muller

Chairperson, Dental Tribunal of NSW, Psychologists Tribunal of NSW, Physiotherapists Tribunal,
Optometrists Tribunal, Osteopaths Tribunal, Podiatrists Tribunal

Deputy Chairperson, Nurses and Midwives Tribunal, Pharmacists Tribunal and Chiropractors
Tribunal

Much of the work of the committee is undertaken through the operation of four sub committees which deal with the following : membership, the COAT newsletter, the annual conference and education and training.

Annual conference program - Quality Decision Making

8.30 am Registration.

9.00 am Welcome and Conference Opening - Judge Kevin O'Connor AM, Convenor, COAT NSW Chapter Inc.

9.10 am Keynote Address:

"Jurisdiction and Powers of Tribunals: A Question of Statutory Construction"

Presenter: The Hon. Justice John Basten, Judge of Appeal, Court of Appeal, Supreme Court of NSW.

10.00 am – MORNING TEA

10.30 am COAT National Report: Kay Ransome, National Convenor.

10.45 to Session 1: Improving Our Techniques

12.45 am *Session Chair:* Suellen Bullock, Director (NSW), Commonwealth Social Security Appeals Tribunal.

(1) 10.45 am *"Managing Communication in the Hearing Room: Reflections of an Observer"*

Presenter: Ms Joanna Kalowski, Judicial Educator & Senior Mediator

(2) 11.30 am *"Saying it Clearly and Plainly in Writing"*

Presenter: Mr Michael Wall, Professional Editor

(3) 12.15 pm *"Personal Data and Decisions in the Age of the Internet"*

Presenter: Megan O'Brien, Churchill Fellow; Caselaw Business Analyst, NSW Department of Justice and Attorney General

12.45 pm – LUNCH

1.30 – Session 2: Appeal Proofing your Decisions

2.45 pm *Session Chair:* Magistrate Nancy Hennessy, Deputy President, Administrative Decisions Tribunal of NSW.

Panel: Justice Stephen Rothman AM, Judge of Supreme Court of NSW; Dr John Griffiths SC, Barrister; and Ms Anne Britton, Senior Member, Commonwealth Administrative Appeals Tribunal.

2.50– 3.50 Session 3: Handling Complaints about the Conduct of Members

pm *Panel:* Mr Denis O'Brien, Principal Member, Commonwealth Migration and Refugee Review Tribunals; Judge Greg Keating, President, NSW Workers Compensation Commission; Ms Di Robinson, President, Guardianship Tribunal of NSW.

3.50 pm CLOSING REMARKS

Judge Kevin O'Connor, AM, Chapter Convenor

4.00 pm - REFRESHMENTS

NSW Chapter of
the Council of
Australasian
Tribunals
(COAT)

Secretary

Belinda Cassidy

Email:

bcassidy@maa.nsw.gov.au

Direct phone:

02 8268 1488

National COAT

Website:

www.coat.org.au

Dates for your Diary

- 7 May 2010 5th Annual Conference of NSW Chapter of COAT to be held at the Menzies Hotel Sydney
- 10-11 June 2010 13th Annual AIJA Tribunals Conference in association with COAT to be held at the Mercure Hotel in Brisbane see the AIJA website <http://www.aija.org.au>
- 22-23 July 2010 AIAL National Fom to be held at the University of Sydney see the AIAL website www.law.anu.edu.au/aial/index.html
- 15 September 2010 4th Annual Whitmore Lecture and AGM of NSW Chapter of COAT