



Administrative Decisions Tribunal
New South Wales

The Hon. Bob Debus MP
Attorney General
Parliament House
SYDNEY NSW 2000

Dear Attorney,

In accordance with section 26 of the *Administrative Decisions Tribunal Act 1997*, I am pleased to present the fourth annual report of the Tribunal, covering the period 1 July 2001 to 30 June 2002.

Yours sincerely,

Judge KEVIN O'CONNOR AM
President

24 October 2002

THE YEAR IN REVIEW



Tribunals play a significant role in maintaining a just society. They contrast with the mainstream courts in a number of ways. Tribunals are often charged with dealing with relatively modern and novel social legislation. They are charged with using procedures and modes of dispute resolution more informal than those found in the courts, and often include specialist members and lay members representing the community.

On the other hand, tribunals depend almost entirely on decision-making officers with limited tenure. The courts depend on full-time judicial officers with permanent tenure; and that in one way signifies their independence from executive government. Some tribunals are headed by judges as a way of affording them some measure of visible independence. In the case of this Tribunal the President is required to be a judge and the head of the Equal Opportunity Division has usually been a judicial officer. The rest of the members have three year terms.

While there is a public interest to be served in having term appointments - such as capacity for some turnover, adjustments for new jurisdictions, opportunity to test people before higher or longer appointments - complete reliance on short term appointments militates against the development of structured careers in tribunal service. The result is that people often follow a career of their own making in the world of tribunals, through holding a sheaf of appointments, and making their choices as to which offers of work they take. This is little or no strategic management of the public resource these members represent.

There is a strong case, as I see it, for a more sophisticated approach on the part of governments to the operation of tribunals. In August 2001, the United Kingdom government commenced official consultation on the wide-ranging recommendations of a review of Tribunal arrangements in that country conducted by Sir Andrew Leggatt. The Leggatt report firmly supported the proposition that government should support and manage tribunals in a coherent way. It considered that many tribunals could sensibly be merged. In the interests of better securing their independence it considered that they should be managed by the department of state responsible for the administration of justice. In the Australian context this would be the state Attorney General's Department. Importantly it recommended that all appointments to tribunals should, like all appointments to courts, be handled by the law minister - here the Attorney General.

The report recommended that 'the citizen should be presented with a single, overarching structure, giving access to all tribunals'. Under this approach citizens would, whatever their problem, deal initially with a separate agency of government, the Tribunals Service. The Service would assist the citizen with where to go and what to do. The Service could support both merged tribunal structures and tribunals that have, for reasons such as size or degree of uniqueness, been kept separate. The report proposed that most UK tribunals be brought into a single structure divided into two wings 'administrative' (disputes between the citizen and the state) and 'civil' (disputes between parties). Above these wings would be placed a single Appellate Division. During its deliberations, Sir Andrew Leggatt, a retired Lord Justice of Appeal, who was assisted by Dame Valerie Strachan, a former head of the customs and excise service, visited Australia, in particular the Commonwealth Administrative Appeals Tribunal, the Victorian Civil and Administrative Tribunal and this Tribunal. Some of the approaches that have been developed in Australia can be seen reflected in the final recommendations.

At State level, Victoria already has a single Tribunal bringing together almost all the State's prior separate tribunals (the main exception is professional discipline). The Western Australian government has decided to establish a general civil and administrative tribunal along Victorian lines. In New South Wales, a different path has been chosen. During the year an integrated consumer tribunal, the Consumer, Trader and Tenancy Tribunal (CTTT) was created. It combines the jurisdictions of the Fair Trading Tribunal that dealt with consumer credit compliance, home building disputes, consumer claims, motor vehicle claims with the Residential Tribunal which dealt with residential tenancy, strata titles and residential park disputes. The CTTT is managed by the Department of Fair Trading. It commenced operation on 25 February 2002.

In last year's report I referred to the Parliamentary Committee that had undertaken a review of this Tribunal's jurisdiction and operation. Its discussion paper focused on the scatter of small professional disciplines across various portfolios, and their possible integration into this Tribunal. Its final report has yet to be published.

At national level one small step towards a more sophisticated approach to the management of the resource that tribunals represent is now being taken. With the assistance, in particular, of the Commonwealth Attorney General and the Commonwealth Administrative Review Council, a new body to be made up of

tribunal heads from all jurisdictions has been established, the Council of Australasian Tribunals (COAT). An interim constitution and interim executive has been established, of which I am a member.

The intention is that there be State Chapters under the rubric of COAT. These Chapters and COAT will provide a resource in relation to such issues as information-sharing, educational programs for members, registry arrangements, public communication strategies, member selection, member retention and independence from government. Steps towards creating a New South Wales Chapter will occur in the near future.

During the year, with the creation of the CTTT my term as part-time Chairperson of the Fair Trading Tribunal ended, thus enabling me to concentrate fully on my responsibilities as President of this Tribunal. My ability to split my time for three years between two major tribunals in different portfolios was made possible largely by the dedicated support given to me by this Tribunal's Deputy President, Nancy Hennessy.

The work of the Tribunal would be impossible without the dedicated services of so many part-time members whose backgrounds reflect the diversity of jurisdictions. The Tribunal presently has, in addition to its two full-time members, 63 part-time judicial members (including for this purpose Divisional Heads) and 73 part-time non-judicial members. They are listed in an appendix.

The Registry, headed by Cathy Szczygielski and Karen Wallace, continued to operate smoothly in year when a staff restructure took effect and substantial renovations occurred. I should also pay tribute to my long-time associate, Lynne Watson. The preparation of this annual report largely fell to a recent law graduate, Kristy Cassoff, who was appointed as the Tribunal's first Research Associate in November 2001.

OUR OBJECTIVES

The Tribunal's objectives are set out in the objects clause of the legislation governing the Tribunal. These objectives guide the Tribunal in its practices and procedures. Section 3 of the *Administrative Decisions Tribunal Act 1997* (the ADT Act) states:

The conceptual classification used by the ADT Act to define the work of the Tribunal – 'review of reviewable decisions' and 'original decisions' – does not precisely capture the difference between the business of the Tribunal that is of an 'administrative' or public law character and that which is of a 'civil' or private law character (the latter being a dispute between parties).

3. Objects of Act

The objects of this Act are as follows:

- (a) to establish an independent Administrative Decisions Tribunal:
 - (i) to make decisions at first instance in relation to matters over which it is given jurisdiction by an enactment, and
 - (ii) to review decisions made by administrators where it is given jurisdiction by an enactment to do so, and

- (iii) to exercise such other functions as are conferred or imposed on it by or under this or any other Act or law,
- (b) to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair,
- (c) to enable proceedings before the Tribunal to be determined in an informal and expeditious manner,
- (d) to provide a preliminary process for the internal review of reviewable decisions before the review of such decisions by the Tribunal,
- (e) to require administrators making reviewable decisions to notify persons of decisions affecting them and of any review rights they might have and to provide reasons for their decisions on request,
- (f) to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs,
- (g) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales.

OUR DIVISIONS AND THE APPEAL PANEL

There are six operating Divisions of the Tribunal.

Three Divisions deal substantially or exclusively with disputes between citizens and government. These are the:

- *General Division*: operative 6 October 1998. This Division hears most applications by citizens for the review of administrative decisions or administrative conduct.
- *Community Services Division*: operative 1 January 1999. This Division hears applications for review of various administrative decisions made in the Community Services and Disability Services and Ageing portfolios. Its main business at present involves the hearing of applications by citizens for exemption from prohibition on being engaged in child-related employment because of a past serious sex offence.
- *Revenue Division*: operative 1 July 2001. This Division hears applications for review of various State taxation decisions.

The Legal Services Division is the fourth Division of an 'administrative' or 'public law' character.

- *Legal Services Division*: operative 6 October 1998. This Division hears complaints referred under the *Legal Profession Act 1987* against legal practitioners and licensed conveyancers.

Two Divisions (Equal Opportunity and Retail Leases) are engaged in dealing with disputes of a 'civil' character.

- *Equal Opportunity Division*: operative 6 October 1998. This Division hears complaints of unlawful discrimination referred to it by the President, Anti-Discrimination Board, under the *Anti-Discrimination Act 1977*.

- *Retail Leases Division*: operative 1 March 1999 - hears retail tenancy claims and unconscionable conduct claims made by parties to shop leases under the *Retail Leases Act 1994*.

Appeal Panel

The Tribunal has an Appeal Panel, which hears appeals from decisions made by the Divisions of the Tribunal, as prescribed by Chapter 7 of the ADT Act.

GENERAL DIVISION

The President, Judge Kevin O'Connor, is the Divisional Head of the General Division. Ms Nancy Hennessy, Deputy President is also substantially involved in the direction and work of this Division.

Structure and Functions

Merits review applications are heard by a judicial member sitting alone unless there is a requirement to the contrary, as in school appeals and local government cases. The usual procedure is for the application to be referred to one directions hearing before the President or a Deputy President, at which all steps are arranged, including a hearing date.

The directions hearing soon after filing. In most cases a final hearing date is usually set for four to six weeks ahead.

One class of business (about 22 per cent of all applications) is dealt with differently. These are applications relating to information law rights, made under the *Freedom of Information Act 1989* (FOI Act) for review of agency determinations or under the *Privacy and Personal Information Protection Act 1998* (PPIPA) for review of agency conduct. These applications are progressed by way of 'planning meetings'. These are relatively informal meetings held between the applicant and representatives of the agency (usually a legal officer and the FOI/Privacy officer). An attempt is made at these meetings to identify possibilities for resolution of the dispute or reduction of the issues to go to hearing. There is, in these cases, often room for movement between the parties as to the scope of the dispute. Often there will be two or more planning meetings before the application goes to hearing. This activity is best described as 'attempts at settlement' rather than mediation of the formal kind.

Case load

The General Division's case load decreased by about 16 per cent in the year under review. Hopefully this is a sign that a degree of predictability is being provided by the General Division's decisions.

During the year the Division received 291 applications for review, two applications for original decisions and one veterinary surgeons discipline matter, compared to 336, 14 and zero respectively, in the previous year.

Review applications were brought under 19 different statutes. Three-quarters of this work was connected with six statutes: information rights (reviews of freedom of information (FOI) determinations, reviews of agency compliance with the relatively new PPIPA) - 68 matters (22 per cent), firearms and security licences - 61 matters (21 per cent), bus and taxi driver licences - 53 matters (18 per cent), breath test suspensions pending Court hearing - 45 matters (15 per cent). The main shift in business as compared to last year related to commercial fishing licence decisions reviews. There were 34 filings in 2000-2001 as compared to 12 this year. Breath test suspension reviews decreased (from 75 to 43), although bus and taxi driver licence reviews increased (from 36 to 53).

During the year, the Tribunal completed 280 General Division review applications. In 20 per cent of matters the final order set aside or varied the decision under review, and 3 per cent were considered to be outside jurisdiction. The remaining 77 per cent of matters were divided - 34 per cent dismissed prior to hearing (sometimes involving a settlement or other form of agreed outcome) and 43 per cent of decisions under review were affirmed.

Significant cases and themes

The more complex matters during the year tended to involve information rights reviews and commercial fishing licence reviews.

The issues considered in the information rights cases included:

- principles applicable to the amendment of professional opinions contained in personal records;
- principles to be applied in relation to disputes over the adequacy of an agency's search for records to which access has been sought;
- the issuing of summonses by a review applicant in connection with application for review under the FOI Act;
- the extent of protection given to a tribunal from the operation of the FOI Act;
- the scope of various exemptions, including the secrecy provisions and the operations of agencies exemptions;
- who is an interested person for the purposes of becoming a party to proceedings between a review applicant and the agency; and
- whether applicants have reduced rights of review when the Cabinet documents, Executive Council documents and law enforcement documents exemptions are relied upon.

Frequently invoked exemptions which have now received consideration are the personal affairs exemption, the legal professional privilege exemption, the law enforcement documents exemption and the in-confidence exemption.

The issues considered in the commercial fishing cases include:

- the need for licensees to be able to provide satisfactory evidence, including official documents, in support of claims that they are entitled to restricted fishery endorsements on the basis of their net or catch history;
- the approach to be taken to assessing inherited catch history;
- the nature of the decision-making relationship between the Minister and the fisheries review panels; and

- the scope of the legislation.

The Division has dealt with a few applications falling in its original decisions jurisdiction including one local government case.

Veterinary Surgeons Discipline

The Veterinary Disciplinary Panel sits in the General Division and hears charges of professional misconduct brought by the Veterinary Surgeons Investigating Committee (VSIC). As at 30 June the Panel had two surgeons before it, one the subject of one inquiry, the other the subject of four inquiries. The VSIC also has power to make final penalty orders in respect of conduct that is unsatisfactory but does not amount, prima facie, to professional misconduct. These orders may be the subject of an application for review heard by a single member of the Division, not the Panel. In the last year there was one such case – the Tribunal set aside the orders, (with one limited exception).

COMMUNITY SERVICES DIVISION

The Divisional Head is Mr Tom Kelly, Deputy President who serves on a part-time basis.

Structure and functions

The Division is the successor to the Community Services Appeals Tribunal. It has both a merits review and original decisions role. At present, most of the applications are for original decisions in respect of applications by individuals for exemption from an employment prohibition (see below). The review applications relate, in particular, to decisions about custody and guardianship of State wards; disability funding; and alleged failure by the Department of Community Services to act on the recommendations of the Community Services Commission. When hearing a merits review application, the Tribunal sits as a three member panel, made up of a member with legal qualifications and two other members who have experience or knowledge directly relevant to the subject matter of the proceedings.

Case load

There were 70 applications filed during the year of which 59 (85 per cent) were original applications under the *Child Protection (Prohibited Employment) Act 1998* (CPPE Act). This compares to 60 filings last year of which 44 were CPPE Act applications. In the two years since the CPPE Act was proclaimed, the number of these applications has grown by 36 per cent. Many of these take much less time to hear than merits review applications.

Significant cases and themes

Under the CPPE Act a person who has been convicted of a ‘serious sex offence’ must not apply for or engage in ‘child-related employment’. The Tribunal or the NSW Industrial Relations Commission may exempt such a person from the prohibition if it considers that they are not a risk to persons under the age of 18 years.

During the year the question arose as to whether a person is affected by the prohibition if the only relevant offence(s) is one which is covered by s 579 of the *Crimes Act* i.e. it is to 'be disregarded for all purposes whatsoever', and is 'inadmissible in any criminal, civil or other legal proceedings as being no longer of any legal force or effect'. This protection applies after 15 years where a person was placed on a bond and has not re-offended in a serious way. The Tribunal, adopting the reasons of the Industrial Relations Commission (Hungerford J), has held that the offences protected by s 579 fall outside the CPPE Act. The Supreme Court (Dowd J) has upheld this interpretation: *Commission of Children and Young People v AG* [2002] NSWSC 582. This decision, while it stands, should eliminate a significant number of the more simple applications that are made to the Tribunal, provided employers are aware of and recognise the effect of the decision. The IRC ruling is under appeal to a full bench of the IRC.

Self-represented litigants

The majority of people making applications to the Division are not legally represented. Many are not well educated or they have a disability, and may not have sought or be qualified for legal aid. These applicants are opposed by a government department or agency that is represented by at least a solicitor and sometimes by a solicitor and a barrister. This requires the Division to be especially vigilant in ensuring that the proceedings are conducted as informally as possible and that the procedures and law as well as the applicants' rights and risks are fully explained.

In one application heard during the year, a self-represented applicant was successful in challenging the removal of a Minister's ward from her custody. The Department appealed to an Appeal Panel, the grounds of which were so legally complex that the self-represented applicant would not have been able to participate in the hearing. The NSW Bar Association provided an experienced pro bono barrister that resulted in all issues being fully argued and submitted. The Appeal Panel is expected to give its decision in August 2002.

REVENUE DIVISION

This is a new Division of the Tribunal that commenced operation on 1 July 2001. A Divisional Head has not been appointed, and the President has for the time handled those responsibilities.

Structure and functions

A judicial member sitting alone hears applications for review. Initially, a directions hearing is held. Often the parties will agree to the matter being heard 'on the papers' having regard to written legal submissions, as the underlying facts are usually not in dispute. The judicial members appointed or assigned to this Division all have substantial tax law expertise.

Case load and significant themes

During the year 48 applications were filed. There were 27 matters completed. The decision of the Chief Commissioner, State Revenue was set aside or varied in four

matters, and affirmed in seven. There were 16 matters withdrawn or dismissed without hearing. The cases fell into a narrow band: mainly disputes over penalties for late payment of land tax on residential investment properties, connected often with claims that owners had not been aware of their responsibilities in respect of a relatively new scheme.

LEGAL SERVICES DIVISION

The Divisional Head is Ms Caroline Needham SC, Deputy President who serves on a part-time basis.

Structure and functions

The Legal Services Division is the successor to the Legal Services Tribunal. Under the *Legal Profession Act 1987* (LPA), the Division determines charges alleging professional misconduct or unsatisfactory professional conduct against legal practitioners and licensed conveyancers. Proceedings in the Division can only be commenced by the Legal Services Commissioner, the Law Society of New South Wales or the Bar Association of New South Wales.

Hearings are conducted by three member panels, comprising two senior practitioners and a non-judicial member from the general community.

The Division's jurisdiction operates concurrently with the Supreme Court. The Court, in the exercise of its inherent jurisdiction, may remove a practitioner from the roll of legal practitioners, a jurisdiction confirmed by s171M of the LPA. Consequently, the informant may elect to proceed directly in the Supreme Court rather than via the Tribunal.

During the present reporting period, the Court of Appeal of the Supreme Court heard three major professional conduct proceedings, exercising its inherent jurisdiction. Each case dealt with allegations that the practitioner's conduct of their private affairs bore on their fitness to remain a legal practitioner.

Two cases dealt with failures by barristers to file income tax returns or pay tax over an extended period (17 years and 38 years respectively). The Court found the practitioners guilty of professional misconduct and declared that they were not fit and proper persons to be on the roll of practitioners: *New South Wales Bar Association v Somosi* [2001] NSWCA 285 (31 August 2001), *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 (31 August 2001). A similar order was made in a third case, *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62 (12 March 2002). This case dealt with failure to disclose convictions when applying for employment as a solicitor and a further failure to disclose subsequent convictions to the Law Society.

Case load

Thirty-eight applications were filed during the year, the same number as last year. Of these, 29 involved allegations of professional misconduct, while eight contained both professional misconduct and unsatisfactory professional conduct allegations.

The High Court's decision in *Barwick v Law Society of New South Wales* [2000] HCA 2 affected many of the matters in the Tribunal at the time of the decision. This year five matters without jurisdiction were withdrawn as they were affected by the procedural defect in the way the investigation was conducted by the informant professional body. Many of these matters have been recommenced in the Tribunal. There are now only three matters affected on foot at the time of the *Barwick* decision that are under consideration by the relevant disciplinary body.

Legislative reform

In July 2001 the *Legal Profession Amendment (Disciplinary Provisions) Act 2001* was enacted. The Act conferred special powers on the Law Society and the Bar Association to cancel or suspend practising certificates, pending further hearing, in respect of bankruptcy, indictable offences, tax offences and failures to notify such matters. There are also provisions allowing for the Tribunal to convene a higher level panel. These latter provisions are yet to commence. When commenced, the provisions will allow the President to constitute a panel headed by a judge, and if desirable include two community members (instead of one). Judge-headed panels will be directly appealable to the Court of Appeal, bypassing the Appeal Panel. This will assist in enabling the Tribunal and the Court to deal more quickly and authoritatively with cases alleging serious professional misconduct.

In April 2001 the New South Wales Law Reform Commission released a report, *Complaints against lawyers: an interim report*. The report made a number of recommendations for change to the operation of the Legal Services Division. These included: giving the Tribunal power to extend the time limit for bringing a complaint; and giving the Tribunal power to order compensation and any other orders it sees fit. Other recommendations included abolishing appeals to the Appeal Panel and repealing the strict rules of evidence in the Division's hearing so long as natural justice is afforded to the practitioner. The Government has yet to announce its response to the report.

Significant cases and themes

During the year the Tribunal ordered 11 legal practitioners be struck off for professional misconduct. Most of the cases involved abuse of client trust in relation to financial matters.

Three of the cases, involving four solicitors, were about solicitors mortgage lending activities. The conduct included:

- practising without a current practising certificate combined with misappropriation of client mortgage investment funds;
- failure to establish a separate trust account, intermingling of office and client monies, repeated lending of pooled client monies on mortgage without adequate securities, repeated failure to advise clients of losses; and

- unauthorised use of client monies held in trust for investment for the purpose of meeting a private debt owed by the solicitor, creation of sham loan transaction to disguise ultimate use of monies and to mislead the Law Society's investigators;

Four other cases involved forms of misuse of trust monies, including:

- repeatedly misleading the lender as to the amount sought by purchaser clients by way of mortgage loan, and appropriating the difference between the amount lent and the amount made available to clients while leaving the clients potentially exposed to liability for the full amount lent;
- misuse of the client's authority to operate his bank account (ATM card) so as to draw substantial amounts of money for private use;
- repeatedly failing to deposit trust monies in trust account, misusing client monies to meet private debts, delay in lodgment of dutiable documents and payment of duty, failing to keep adequate accounting records in respect of trust monies, hindering and obstructing investigation and receivership action; and
- repeatedly misleading State tax office as to the proper taxable amount, and in relation to compliance with lodgment requirements, delays leading to clients incurring penalties, failing to deposit trust monies in trust account.

A further four cases involved other types of professional misconduct:

- barrister in an application form for interstate admission stated falsely and dishonestly that he was not the subject of disciplinary proceedings in New South Wales
- barrister convicted of serious criminal offences and imprisoned
- failure to pay counsel's fees when client monies held in trust
- solicitor practising without a current practising certificate over several years.

Jurisdictional Issues: The Division continued its practice of not making any orders in proceedings conceded or held to lack jurisdiction. During the past year, a number of cases in the Court of Appeal or the Appeal Panel have dealt with jurisdiction issues. These included the effect of transitional provisions on proceedings commenced in former tribunal (see *Bar Association v T* [2001] NSWCA 316); effect of the High Court's *Barwick* on the introduction of an amended information into proceedings current at the time of the decision (*Mitry v Bar Association* [2001] NSWCA 273); and effect of decision on reasons published prior to decision in *Barwick* in a case affected by *Barwick* (*Hughes (No 2) v Law Society* [2002] NSWADTAP 23).

Application to stay Tribunal decision pending appeal: Following the hearing of fresh informations in *Barwick* case dealt with in *Law Society v Barwick and Dechnicz* [2002] NSWADT 66, the Tribunal ordered that the practitioners be struck off the roll of solicitors. The charges found proven related to the administration of various estates and the misapplication of funds placed for investment on secured first mortgages. In *Barwick v Law Society of New South Wales* [2002] NSWADTAP 21 one of the practitioners applied for an interim stay of the Tribunal's decision to allow him to return to practice pending the outcome of his appeal. The Appeal Panel held that the decision of the Tribunal should not be lightly interfered with, and that a practitioner seeking to return to his or her practice after a strike-off order must demonstrate countervailing public interest considerations that are exceptional.

EQUAL OPPORTUNITY DIVISION

Structure and functions

The Equal Opportunity Division is the successor to the Equal Opportunity Tribunal and its primary role is to undertake inquiries into complaints under the *Anti-Discrimination Act 1977* (the ADA) referred by the President of the Anti-Discrimination Board.

The Divisional Head is Deputy President Judge Latham. Judge Latham serves the Tribunal on a part-time basis and combines the role with her duties as a Judge of the District Court.

Case load

During the year the Division finalised 123 complaints.. This compares to 118 completions in the previous year. A complaint will often refer to a variety of circumstances and allege more than one form of unlawful discrimination. The most frequently cited grounds of complaint were disability (40), sexual harassment (22), sex (21) and race (17). In addition there was an allegation of victimisation in 32 cases, an allegation that is often linked to the citing of a primary ground of discrimination. The Tribunal also received five complaints of transgender discrimination and two complaints of transgender vilification.

Mediations

The Tribunal conducts mediation to assist parties in resolving their differences. During the year 33 matters were referred to mediation by an Equal Opportunity Division member with special training in mediation techniques. Of those matters, 22 were resolved and 11 were referred for hearing.

Use of case conferences

The implementation of the case conference as a case management procedure has proved successful in the Division, particularly with unrepresented complainants. The case conference has provided an opportunity to explain to complainants the matters that must be established on the evidence, if the complaint is to be upheld. It has ensured better access to the Tribunal in the Equal Opportunity Division where substantiation of a complaint often depends upon complex legal requirements. The procedure has, generally speaking, contributed to more efficient hearings.

Significant cases and themes

Disability and occupational health and safety laws: In two cases the Tribunal considered the interaction between the ADA and Occupational Health and Safety legislation. An employer may be exempt from compliance with the ADA if it can be established that discriminatory conduct is necessary to comply with occupational, health and safety legislation.

In *Higginson v Cargill* [2001] NSWADT 152, the Division found that an employer's refusal to permit an abattoir worker to return to work after a knee operation was unlawful in the circumstances. The Appeal Panel affirmed the decision: *Cargill Australia Limited v Higginson* (EOD) [2002] NSWADTAP 20. The Appeal Panel stated that in reaching a conclusion on whether occupational, health and safety legislation applied, all the relevant circumstances must be taken into account including:

- whether the person is able to perform the genuine physical requirements inherent in a particular position (this factor is sometimes expressed as being currently fit for work);
- whether the person is at any greater risk of injury or deterioration than other employees without the same or similar disability as the person (when considering this matter the person's medical and work history is relevant, including whether the person has suffered work-related injuries in the past);
- whether the employer has any options, other than refusing to allow the person to work, which would minimise or eliminate the risk of injury or deterioration; and
- the consequences for the person and/or other employees if the person is injured or if his or her health deteriorates.

The interaction of these laws also arose in *French v Sydney Turf Club Ltd* (No. 2) [2002] NSWADT 98. In this case a bar attendant who suffered from a back and leg injury claimed that her employer had discriminated unlawfully on grounds of disability by refusing to give her a full shift. The Tribunal was satisfied that the employer's decision was in conformity with occupational, health and safety requirements, after taking account of medical evidence. An appeal has been lodged.

Indirect sex discrimination: In *Bonella & ors -v- Wollongong City Council* [2001] NSWADT 194 (affirmed on appeal: *Wollongong City Council v Bonella & ors and Bonella & ors -v- Wollongong City Council* (EOD) [2002] NSWADTAP 26) five women, employed as assistant librarians, lodged a complaint of discrimination on the ground of sex as their employer had refused to provide them with a car for private use. The Tribunal found that Wollongong City Council provided cars for the private use of around 83 per cent of male assistant librarians and 46 per cent of female assistant librarians. The five assistant managers had requested provision of cars with private use rights, but their requests were denied. The Tribunal found that by denying their request the Council had unlawfully discriminated against the women on the ground of sex. The Tribunal awarded each of the librarians \$7,500 in general damages.

Racial Vilification through Newsletter: In *Veloskey v Karagiannakis* (EOD) [2002] NSWADTAP 18 the Appeal Panel considered whether an article published in a bi-weekly newspaper *O Cosmos* contravened the racial vilification provisions of the ADA. The appellant submitted that that the article incited hatred, serious contempt for, or severe ridicule of Aegean Macedonians on the ground of their race. One of the issues was whether there needs to be proof of 'intention' to incite.

The Appeal Panel stated that any ambiguity on the face of the provision is resolved in favour of a construction which does not require any intention to incite on the part of

the respondent to the complaint. The Appeal Panel held that in the context of vilification provisions, the question is, could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race? The question for the Tribunal to determine is whether the ordinary reasonable person, reading between the lines, would be incited of hatred towards, serious contempt for, or severe ridicule of Aegean Macedonians.

The Appeal Panel was satisfied that the article as a whole expresses hostility towards, contempt for and ridicule of those who identify themselves as Macedonian. However, the Appeal Panel was not satisfied that the standard of contempt or ridicule was serious or severe. The Appeal Panel allowed the appeal and dismissed the complaint.

Procedural Issues: On occasions, the Tribunal has awarded compensation at the statutory limit of \$40,000. This occurred again this year in *Peck v Commissioner of Corrective Services* [2002] NSWADT 122. The Tribunal has also made a number of detailed decisions on procedural issues such as the criteria relevant to joinder of parties in proceedings (*Bignell v New South Wales Casino Control Authority* [2001] NSWADTAP 41), the factors relevant in exercising the discretion to grant an extension of time for lodgement of an appeal (*Lupevo Pty Ltd t/a Ampol Nabiac v Bree* [2002] NSWADTAP 9) and factors in dismissing a complaint 'for any other reason' under s 111 of the *Anti-Discrimination Act 1977* (*Crewdson v Niland* [2002] NSWADTAP 5).

RETAIL LEASES DIVISION

Structure and functions

The Division has operated since 1 March 1999. The first Divisional Head is Dr Christopher Rossiter, Deputy President who serves on a part-time basis. Dr Rossiter is an Associate Professor of law at the University of New South Wales. His appointment commenced on 6 December 2001 for three years. Dr Rossiter is a leading academic lawyer in the field of real property law and is presently a part-time consultant to a major law firm. He is a noted writer in the field and editor of a leading practice service. His previous tribunal experience includes Deputy Chairperson (part-time), Commercial Tribunal, the tribunal responsible for determining retail leases disputes between 1994 and 1999.



Deputy President, Dr Christopher Rossiter

Structure and functions

Previously, a retail lease claim could only be made in relation to breach of the statutory requirements set out in the *Retail Leases Act 1994* (RLA) or in breach of common law requirements. Now it is also possible to bring a claim on the basis that the other party to the lease has engaged in ‘unconscionable conduct’. Relevant factors are listed in s 62B.

During the year, most of the preliminary and main hearings in retail tenancy claims under s 71 were conducted by one of five judicial members, each of whom is a highly experienced practising senior solicitor with expertise in commercial leasing. In most cases, the members actively seek to generate options for early resolution.

An unconscionable conduct claim must be heard by a specially constituted three member panel (in contrast to the single judicial member panel that hears retail tenancy disputes). The three-member panel comprises a presiding member with special standing assisted by two advisory members, one representing lessor’s interests, the other representing lessee’s interests. The preliminary and main hearings in respect of unconscionable conduct claims or combined retail tenancy claims and unconscionable conduct claims were heard with either the President or the Deputy President presiding and, again, every effort is made to encourage the parties to seek early resolution of the dispute.

Case load

There was a noticeable increase in applications in the current year. Last year 107 applications were filed. This year the number is 137. This increase is partly due to the commencement of the unconscionable conduct claims jurisdiction from 12 October

2001. There were 16 applications in which an unconscionable conduct claim was made.

As noted earlier, the Division seeks to progress matters quickly, as, almost invariably, the applications arise in urgent commercial contexts. There is a strong emphasis on encouraging settlements. The cases that reach the Tribunal will, normally, have first been dealt with by the statutory mediation service, the Retail Tenancy Unit. As soon as the Tribunal receives an application, the Retail Tenancy Unit is notified. If the Unit has not been involved in the matter, wherever practical it is referred to the Unit. An officer of the Unit often attends directions hearings. Even if the case is not mediated successfully there, the Tribunal will continue to try to obtain a practical and fair settlement.

The result has been that of the 103 matters dealt with during the year, only 19 gave rise to a full hearing. Seventy-eight matters were resolved prior to hearing and six by way of consent orders made by the Tribunal. In the case of the remaining 19, 10 were dismissed and orders made in nine. The statistics do not reveal who the initiating party was; but the Tribunal's experience is that it is almost always a lessee.

Significant cases and themes

The present year has seen a number of cases involving claims made by lessees over the effect of redevelopment and refurbishment works on their ability to trade satisfactorily, or their entitlement to continue as lessees.

Many of the applications were for interim orders arising from circumstances such as lessor lock-outs of the lessee for alleged non-payment of rent and other breaches of the lease. Many interim orders return possession to the lessee on the basis that the disputed rent brought up-to-date, with the matter then referred for mediation to the Retail Tenancy Unit. Most of these disputes do not return to the Tribunal except for entry of any orders.

Contested cases involved familiar categories of lease dispute:

- the covenant for quiet enjoyment;
- demolition and construction work inhibiting the lessee's access to the demised premises;
- valuations and calculation of current market rent;
- lease preparation costs and s 13 of the RLA;
- claims for return of bond and nature of bond;
- consequences of the failure to give a statement of outgoing during the tenancy period;
- jurisdiction of the Tribunal where a lease is for a term of less than 6 months; and
- false and misleading representations and s 10 of the RLA.

The Tribunal has also handed down some important decisions in relation to the award of costs. Although the usual rule is that an order for costs will not be made in proceedings before the Tribunal, special circumstances will justify departure from this rule. These decisions assay the relevant principles and identify what constitutes special circumstances.

APPEAL PANEL

The President has overall responsibility for the Appeal Panel's operation.

Structure and functions

The Appeal Panel hears appeals against decisions of the Divisions of the Tribunal. Chapter 7 of the ADT Act defines the jurisdiction of the Appeal Panel. The Appeal Panel must comprise a presidential member of the Tribunal (the President or a Deputy President) as the chair, together with a judicial member and a non-judicial member. The non-judicial member must be drawn from the Division under appeal. At least two of the other members must be drawn from the Division under appeal. In this way the specialist element is retained at the appeal.

The convention is for the Divisional Head to preside in appeals from their own Division, unless the Divisional Head's own decision is under appeal.

Case load

There were 61 appeals filed this year, compared to 53 last year. The distribution of appeals between Divisions broadly reflects the underlying distribution of business in the Tribunal. More detailed statistics are provided in Appendix E.

Appeal outcomes

During the year the Appeal Panel determined 59 appeals. Fifteen were upheld in whole or in part, 36 dismissed, and eight withdrawn or discontinued. Some of the decisions were delivered ex tempore with the giving of short oral reasons.

Forty-four Appeal Panel decisions were published on the CaseLaw website, <http://www.lawlink.nsw.gov.au/caselaw/caselaw.nsf/pages/index>, the cases being numbered [2001] NSWADTAP nos 23-44; and [2002] NSWADTAP nos 1-22; and covered 42 matters. Twenty-two of the delivered decisions arose from General Division appeals; six from Retail Leases Division appeals; eight from Legal Services Division appeals; five from Equal Opportunity Division appeals; three from Community Services Division appeals. One of this group of 44 decisions was set aside on appeal to the Supreme Court; one was affirmed; and there is an appeal pending in one other.

The President presided in respect of 26 of the 44 published appeals; Deputy President Hennessy in respect of 10; Deputy President Latham in respect of six and Deputy President Needham in respect of two.

Significant cases and themes

The Appeal Panel dealt with a range of issues, most of which were procedural or jurisdictional in character. The following is a cross-section of the main issues that arose in appeals during the last year, starting with those going to substantive questions relating to liability. The particular case names have not been set out. They may be found by a search case on the CaseLaw Internet site.

Freedom of Information: interpretation and application of the exemptions relating to material obtained in confidence in a departmental inquiry into conduct of a selection process; criteria relevant to amendment of a professional opinion in a personal record.

Security and Firearms Licensing: scope of power of revocation in respect of recent offence; interpretation of 'serious assault offence'.

Children in Care: interpretation and application of criteria relevant to the removal of foster children from foster care.

Retail Leases Law: meaning of demolition and refurbishment.

Jurisdiction: point at which a reviewable decision arises (termination of custody; conditions on commercial fishing licences) so as to attract the Tribunal's jurisdiction; impact of *Barwick* decision on prior Legal Services Division orders; imposition by primary tribunal of a penalty higher than that made in the decision under review.

Parties and Interveners: need for formal order in legal services matters declaring respondent to be a party; recognition of Registrar, Retail Leases Disputes in retail leases proceedings; determination of whether person has 'interests affected' for purposes of joinder in equal opportunity proceedings.

Disciplinary penalty order: adequacy – arose in one Legal Services appeal and one Veterinary Surgeon appeal.

Costs: criteria for the exceptional award of costs in retail leases matters and in FOI matters; effect of collapse of insurer on practitioner's liability for costs in legal services matter.

Grant of stays pending appeal: where practitioner has been struck off; where agency decision has been set aside by primary tribunal.

Refusal of adjournment application: nature of discretion of primary tribunal.

SUPREME COURT

Under s 119 of the ADT Act, Tribunal decisions are appealable on a question of law to the Supreme Court. Normally the appeal will relate to an Appeal Panel decision. However in some instances there is no right of appeal to an Appeal Panel, and the appeal goes direct to the Supreme Court, i.e. CPPE Act matters. Under s 118 an Appeal Panel may refer a question of law to the Supreme Court for its opinion. This is a power which is exercised cautiously, and used where there is a highly contentious, complex, novel or urgent question of law where final authoritative resolution is highly desirable.

Another way of challenging the Tribunal's decisions is to invoke the original jurisdiction of the Supreme Court by way of originating summons.

During the last year the Supreme Court gave six decisions affecting the Tribunal – two arising from an appeal, one arising from a referral and three arising from originating summonses. The Tribunal's applications for the year were 695. On this basis the 'appeal rate' to the Court was less than one per cent.

Appeals

In *Mitry v Council of the New South Wales Bar Association* [2001] NSWCA 273 (28 August 2001) the Court of Appeal dealt with an appeal against an Appeal Panel's decision reported at [2000] NSWADTAP 9. The Appeal Panel had rejected an appeal from the practitioner against the primary Tribunal's order that his name be removed from the roll of practitioners. There had been four grounds of appeal. The Court of Appeal held that the Appeal Panel had erred in respect of one of the grounds; and the decision was set aside. The error related to the application of the principles as to jurisdiction enunciated by the High Court in *Barwick v Law Society of New South Wales* [2000] HCA 2. In this case, the primary Tribunal had granted leave for the Council to amend the complaint brought against the solicitor after two days of hearing. The Court of Appeal held that the amendment of the information required leave to be granted by the Legal Services Commissioner in accordance with s 138(1) of the *Legal Profession Act 1987* (LPA). In the absence of leave from the Commissioner, the Court found that the Tribunal did not have jurisdiction to decide the matters raised in the amended information. The matter was remitted to the Tribunal for determination. Amendments to the LPA, covered in last year's report, now allow for the filing of fresh, valid information in these circumstances. The Court also held that the facts as found by the primary Tribunal were capable of constituting professional misconduct and that it was open to the Tribunal to order the practitioner be struck off.

In *Puglisi v Administrative Decisions Tribunal of New South Wales* [2001] NSWCA 298 (12 September 2001) licensed commercial fishers appealed against a decision of the Appeal Panel reported at [2001] NSWADTAP 2. The fishers could not satisfy the usual eligibility criteria for obtaining an endorsement to fish for certain species in a restricted fishery. They sought to bring their case within an exception under which an endorsement could be granted in certain circumstances, one of which was that 'for other significant reasons (that are not attributable to the fault of the person) the person was unable to satisfy the eligibility criteria' (*Fisheries Management (General) Regulation 1995* (FMGR) cl 214C(2)(c)(iii)). They had decided not to fish within that period for commercial reasons.

The Appeal Panel had reinstated the Minister's decision, as it considered that the Tribunal had erred in finding that the fishers decision not to fish fell within the exception. The Appeal Panel considered that viewed in its statutory context the words 'reasons (that are not attributable to the fault of the person)' could not be construed so as to cover a commercial decision not to fish during the period which later became the eligibility period. The Court of Appeal affirmed the Appeal Panel's decision but considered that the operative words of cl 214C(2)(c)(iii) were 'was unable to satisfy the eligibility criteria'. The leading judgment is given by Heydon JA. The word 'unable' properly construed, did not cover the circumstances upon which the fishers sought to rely.

Referred questions

In the last annual report the Supreme Court decision of *Commissioner of Police, NSW Police Service v Estate Edward John Russell & Ors* [2001] NSWSC 745 (Sully J) was discussed.

It dealt with three referred questions concerning the Tribunal's jurisdiction under the ADA. One question was relatively minor, and related to the order-making power of the Tribunal. The more important questions related to the extent to which police officer's conduct fell under the ADA, and the extent to which the Commissioner is vicariously liable for the actions of police officers.

As to the conduct issue, the Court held that police conduct pertaining to arrest was not a 'service' to a person within the meaning of the Act, but once a person was placed in custody, the police officers were providing a 'service' to a person within the meaning of the Act; and such services could be the subject of complaint.

The ruling on the nature of vicarious liability was appealed to the Court of its decision and its decision became available prior to finalisation of this annual report: *Commissioner of Police v The Estate of Edward John Russell & Ors* [2002] NSWCA 272 (20 August 2002).

The Court held that an order of the Tribunal may be made only against respondents to the complaint, i.e. those directly complained against, and against other parties such as employers if they have become respondents by virtue of s 53 of the ADA itself.

The Chief Justice delivered the main judgment. The judgment commences with the proposition that the statutory jurisdiction conferred on the Tribunal by the ADA, s 53 is to be interpreted by reference only to that statute. Concepts such as 'tort', 'damages' and 'vicarious liability' should not be introduced into the reasoning process to assist the determination of liability and related issues.

The Chief Justice criticised any attempt to move the 'entire burden' of loss (the award of monetary compensation) away from the actual perpetrator of the unlawful conduct by reference to general principles as to vicarious liability. His Honour saw this approach as better serving the objectives of the ADA. This was reflected in s 53 which created a regime of joint and several liability as between respondents. As to the other question, the Court ruled that in beneficial legislation such as the ADA a liberal approach to the construction of 'employee' should be taken, and one that accorded with other indications in the statute. Accordingly all police are employees for the purposes of the ADA, and their employer is the Commissioner.

Originating summons

In *The Commission for Children & Young People v 'AG'* [2002] NSWSC 582 (28 June 2002) the Supreme Court (Dowd J), as noted in the Community Services Division report above held that s 579 of the *Crimes Act* had the effect of exonerating certain persons from the requirements of the CPPE Act.

In *Strong v Law Society of NSW & Anor* [2001] NSWCA 311 (10 September 2001) a solicitor sought a permanent stay of disciplinary proceedings due to commence in the Legal Services Division of the Tribunal. The stay was based on a claim of abuse of process due to delay of the Law Society in bringing the proceedings and the death of a witness. The Court declined to issue a permanent stay as the Court was of the view that the Tribunal had the power to order a permanent stay once it had heard argument as to the admissibility of evidence before it, that the Tribunal would be expected to proceed fairly and only to make an adverse finding only if satisfied according to the requisite standard of proof. On the issue of the death of the witness the Court observed that there appeared to be a body of material apart from the affidavit of the witness that may seem as capable of supporting some aspects of the complaint. The outcome of this case has been covered in the Legal Services Division report above. The final originating summons case, *Bar Association of NSW v T* [2001] NSWCA 316 (2 October 2001) has also been covered in the Legal Services Division report above.

ADMINISTRATION

Membership

During the year there was a public call for expressions of interest in appointment as judicial members in the Equal Opportunity Division. Five new members were appointed. All had substantial tribunal or advocacy experience. Following the commencement of the unconscionable conduct claims provisions of the *Retail Leases Act* six non-judicial members with a background in retail leasing issues were appointed to sit in an advisory capacity in these cases.

The President, Judge O'Connor, completed his term as Chairperson (part-time), Fair Trading Tribunal in November 2001.

Full details of the Tribunal's membership are given in Appendix A.

Overview of Case load

Ideally a tribunal should clear in each year (unless there is some exceptional factor operating) at least as many matters as have been received. In that way a backlog is prevented from building up.

In 2000-2001 there were 719 matters filed in the Tribunal (666 primary level, 53 appeal level). In 2001-2002 there were 756 matters filed (695 primary level, 61 appeal level). Last year 674 matters were completed. This year 701 matters were completed. As at 30 June 2002 there were 475 matters pending in the Tribunal (including 41 appeals).

It can be seen therefore that the annual clearance rate has been 91 per cent and 93 per cent in the last two years. In the next year there will be an emphasis on increasing the clearance rates in each Division to bring down the number of matters on hand at year's end to a number close to about 40 per cent of the annual intake rather than the present 63 per cent.

The shortfall in the clearance rate during the year under review is seen as largely attributable to the unavailability of the usual number of hearing rooms in the first half of 2002, while renovations were undertaken. There are now four hearing rooms available as compared to two during that period.

Divisional Time Standards

In order to be able to measure more closely its performance, the Tribunal has recently set goals for the completion of matters. This forms part of a program being implemented within the Attorney General's portfolio. The standards are in their early period of operation. For most work in the Tribunal there is a single standard – that 85 per cent of applications be completed within 6 months of lodgment; and all within 12 months. Four of the Divisions have this standard. There is presently a separate standard for Equal Opportunity Division; for Legal Services Division and other Professional Discipline matters (i.e. veterinary surgeons); and for Appeal Panel matters.

Appendix F contains more detailed statistics on case load, and on performance as compared to the time standards.

Rules

The Tribunal's current rules are the *Administrative Decisions Tribunal (Interim Rules) 1998* and are contained in the *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998*.

The Rule Committee

The Tribunal is empowered to make rules with respect to its practices and procedures. The Tribunal's Rule Committee's members are the President and the Divisions Heads who are appointed in an ex-officio capacity. The remaining members are appointed by the Minister and include: Deputy President Nancy Hennessy, Justice Alwynne Rowlands (founding President, Victorian Administrative Appeals Tribunal, presently Family Court Judge), Professor Margaret Allars (barrister and academic) and Mark Robinson (barrister and judicial member of the Tribunal).

The Committee met three times in the reporting period and considered issues such as the Parliamentary Inquiry into the operation and jurisdiction of the Tribunal, the Divisional Subcommittee reports, commencement of the Revenue Division and amendments to the Appeal Practice Note.

Divisional Subcommittees can make recommendations to the Rule Committee about practice and procedure. These Subcommittees met for the first time during this reporting period and are scheduled to meet at least twice each year. Subcommittees are constituted under the ADT Act and are made up of members of the Tribunal from the relevant Division and three people who represent community and relevant special interests in the area. The minutes of each Subcommittee are considered at the next Rule Committee meeting and any recommendations made are debated.

The Divisional Rule Subcommittees can also be used to gain feedback and input on the Tribunals practices. When it is considered useful, the Subcommittee will invite additional stakeholders and users to provide input on particular topics.

Practice Notes

The President has issued eight practice notes relating to case management procedures, including Practice Note Eight issued during the current year. These are:

- PN1 General Division: Freedom of Information Review Applications;
- PN2 Equal Opportunity Division: Case Management Procedures;
- PN3 *repealed*;
- PN4 Application to Change Hearing Dates;
- PN5 Appeals: Procedures for Appeals to the Appeal Panel of the Tribunal;
- PN6 General Division: Referral of Complaint under the Veterinary Surgeons Act 1986;
- PN7 All Divisions: Summons to Attend and Give Evidence; Summons to Attend and to Produce Documents or other things: Tribunal Practice; and
- PN8 Retail Leases Division.

The Tribunal's website is www.lawlink.nsw.gov.au/adt. Information about the Tribunal, its forms, practice notes, legislation and decisions are all available on the website or from the registry.

Access to the Tribunal

The Tribunal is committed to providing access to its services to parties throughout New South Wales. The Tribunal's normal practice is that parties and witnesses should attend to give oral evidence. This is achieved either by the parties attending at the Tribunal's Sydney premises or the Tribunal sitting outside the Sydney CBD. During the year the Tribunal sat in rural and regional locations, including Newcastle, Cooma, Parkes, Dubbo, Tweed Heads and Narrandera.

The Tribunal regularly uses telephone links; in particular for directions hearings and applications for stay orders. These facilities have also been used in hearings for the taking of witness' evidence. The Tribunal can also arrange video link facilities if required.

In other matters, where the parties' cases are based on submissions rather than witness' evidence, the Tribunal determines the matters without the need for the parties to attend a formal hearing.

Alternative dispute resolution

Alternative dispute resolution is used widely in several Divisions of the Tribunal. The Tribunal has the power under s 74 of the ADT Act to conduct a preliminary conference.

In the Equal Opportunity Division most matters are listed for a case conference before a judicial member prior to the hearing. The purpose of this conference is to explore

settlement options and, if the matter is not settled, to ensure parties have their cases ready for hearing. Matters can also be referred for formal mediation by another judicial member who has been trained in mediation techniques.

Prior to cases in the Retail Leases Division being lodged, parties are required to attend the Retail Tenancy Unit for mediation. If the matter has been lodged with the Tribunal without attempting mediation, the Tribunal will often request the assistance of officers of that Unit in attempting to settle the matter.

In privacy and freedom of information applications planning meetings are conducted to explore settlement options and manage the progress of the matter.

The ADT Act also allows for the appointment of assessors and the use of early neutral evaluation. The Tribunal has not found it necessary to use these facilities to date.

Published decisions

A major objective of the Tribunal is to produce decisions which contribute to the shaping of normative values, whether the subject matter is the administrative decisions of government, compliance with equal opportunity or retail leases laws or professional conduct.

To that end, all reserved decisions and any ex tempore decisions seen as having illustrative value are published on the NSW CaseLaw site, as well as through other Internet services such as AUSTLII. In the 2001 calendar year there were 224 primary level decisions and 44 appeal decisions published in this way.



L to R: Karen Wallace, Registrar; Judge Kevin O'Connor, President; Nancy Hennessy, Deputy President and Cathy Szczygielski, Registrar.

The Registry

Accommodation

The Registry is located at Level 15, 111 Elizabeth Street Sydney. Extensive renovations were undertaken during the reporting year. The renovations increased the number of hearing rooms from three to four. Two of the hearing rooms are more informal than the traditional hearing room structure. They have an oval near-continuous table with an open centre, in the style used at the Commonwealth Administrative Appeals Tribunal.

There are also three interview rooms for mediation and conferences. Members' facilities were also improved in the course of the renovation

Staff

The registry has a position of Registrar, Deputy Registrar and nine tribunal officers. Two people who job share fill the Registrar position. A new structure was implemented during the reporting year to streamline processes and to take into account the increased workload of the Tribunal.

As part of the restructure, a position of Research Associate to the President was created. The Research Associate provides legal and research support to assist the President and full time Deputy President in their deliberations, and keeps members of the Tribunal abreast of current issues.

The registry provides the following services: enquiries, registrations, hearing support, case management and general administrative support to members.

Projects

Staff in the registry undertook a flexible service delivery project during the reporting period to review and improve the services of the Tribunal to people with a disability. Correspondence has been reviewed, signage has been improved, and renovations have taken into account the needs of people with a disability. All staff participated in workshops to increase their awareness and improve their skills in this area.

Brochures were developed during the year to assist people in understanding the types of matters coming before the Tribunal, what is involved, and what types of orders can be made. The information is also available on the Tribunal's website.

With the exception of professional disciplinary matters, many of the parties appearing before the Tribunal are unrepresented. The Tribunal has been working on a project to improve services to litigants in person. Procedures before the Tribunal are kept simple, relying on the contents of letters to parties, guidelines and oral advice as the way to guide parties in relation to preparing a matter for hearing and the conduct of a hearing.

Staff development

Staff receive training through the Attorney General's Department's Corporate Development and Training Unit, and attendance at relevant conferences.

Additionally, staff have received in house training on new legislation and procedural changes.

Budget and Financial Information

The Tribunal is an independent statutory body which for budgetary purposes is a business centre within the Attorney General's Department

The Tribunal has two sources of funds: government funding provided from within the budget allocated to the Attorney General's Department and funding allocated by the trustees of the Public Purpose Fund. The Public Purpose Fund is used primarily to meet the costs of operation of the Legal Services Division. The Public Purpose Fund comprises interest earned on solicitor's clients' funds held in compulsory trust account deposits under the *Legal Profession Act 1987*. Appendix D provides a picture of expenditure incurred by the Tribunal in the reporting period.

EDUCATION AND PROMOTION

Website

A primary source of information about the Tribunal and its operations is the Tribunal's Website (managed by the Attorney General's Department). The website address is www.lawlink.nsw.gov.au/adt. The website's rate of use has continued to grow. From July 2001 to March 2002 the number of pages viewed varied between approximately 40,000 and 66,000 views per month. During this time period 478,404 pages of the site were viewed, an average of 53,156 pages per month, compared to 31,659 pages per month in the previous year. This has meant an increase in usage of 66 per cent. This level of usage is three times that of 1999-2000. This appears to continue the trend of increased use of the Tribunal website as noted in previous annual reports. The statistics provided by the Department for April, May and June 2002 seem to be anomalous. They report 415,000, 182,000 and 110,000 pages were viewed each month respectively. The Tribunal is not able to identify any factor that may explain these inflated figures between April and June as business of the Tribunal had remained constant over this time period.

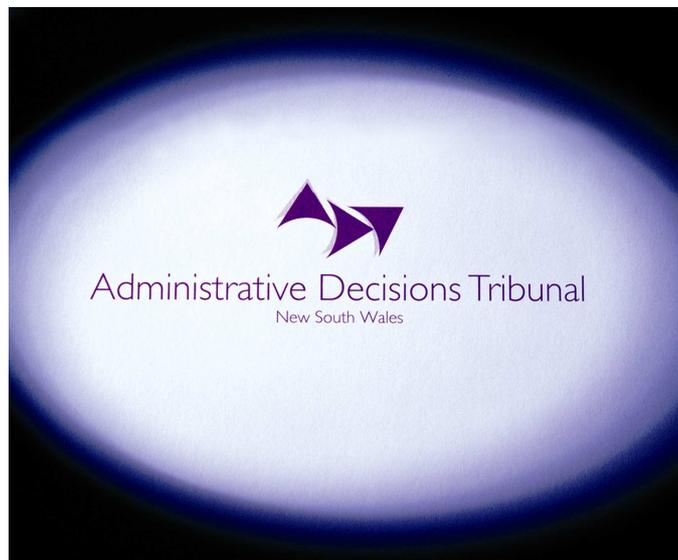
All reserved decisions of the Tribunal, unless subject to a confidentiality order, are electronically published in the CaseLaw NSW service (managed by the Attorney General's Department); the decisions are also available on the most comprehensive legal information site in Australia, the Australasian Legal Information Institute (AUSTLII). The CaseLaw service has highly developed, user friendly search facilities. Publishing decisions electronically enables members to keep in touch with the Tribunal's approach to key issues, and services the needs of parties and practitioners for up-to-date precedents. The previous decisions of the Tribunal are routinely cited and considered in proceedings, thereby contributing to meeting the key goals of any decision-making body, those of consistency, predictability and rationality.

All practice notes and standard forms are available on the website. Practitioners may also subscribe by email to the daily Tribunal hearing list.

Decisions of the Tribunal are frequently referred to in the media, especially equal opportunity and professional discipline cases.

Logo

To complement the renovations to the Tribunal a new logo was introduced during the year. The logo, the colour of which is two shades of lilac, is a stylised version of the letters, A, D and T. It seeks to convey the values of flexibility and appropriate formality, using a colour traditionally associated with equal opportunity and human rights. The new logo is now on all Tribunal correspondence. The logo is displayed in the waiting area and is found on the wall behind the presiding members in each of the Tribunal hearing rooms.



Brochures

The Tribunal has material available in relation to its operations and has recently produced new publications on:

- Review of NSW Government Decisions by the ADT;
- Prohibited Employment Declarations in the ADT;
- Mediation Conducted by the ADT; and
- Discrimination Complaints at the ADT.

Public presentations

The President, Divisional Heads and other members of the Tribunal are invited to give presentations about the work of the Tribunal, usually to professional audiences. This occurred several times throughout the year and a list of significant speeches and presentations given by the President and Deputy President Hennessy is included in Appendix C. Copies of these papers may be obtained from the Tribunal.

Member education

In October 2001, the Annual Professional Development Day was held for Members of the Tribunal on 'Fact Finding in Tribunal Proceedings'. The objective of the day was to deal with a number of specific practical issues that arise for members on this topic. The Hon. Justice Hill of the Federal Court of Australia gave the keynote address. Other speakers included the Hon Justice Faulks from the Family Court of Australia (litigants in person) and Stephen Odgers SC (the Evidence Act).

Topics addressed included:

- Assessing the credibility of witnesses;
- Comparative Inquisitorial/Adversarial Fact Finding Procedures;
- Expert evidence;
- Obligations of members when gathering evidence from litigants in person.

Good Decision Writing: package of videos and training material

A professionally produced set of videos of the 1999 seminar on Good Decision Writing, together with the relevant papers, are available from the Tribunal. The package is available to incoming members to assist them in decision writing. It has been acquired by many tribunals, other organisations such as government authorities with statutory decision-making responsibilities and university law schools with special courses relating to tribunals. The Tribunal has received feedback praising the quality of the seminar and the materials from experienced members of other tribunals. The videos are available at a reasonable cost to interested people or organisations. The Tribunal will be producing another set this year covering the professional development days for 2000-2002.

Australian Institute of Judicial Administration (AIJA) and the Australian Institute of Administrative Law (AIAL)

Tribunal members have actively participated in the work of the AIJA and the AIAL. In April 2002, the President of the Tribunal addressed a seminar of the Queensland Chapter of the AIAL. The AIJA has continued its focus on operation of tribunals culminating in the Fifth Annual AIJA Tribunals Conference in Melbourne in June 2002. The theme of the conference was 'Developing a Best Practice'. The conference was attended by the President, Deputy President Hennessy and Deputy President Judge Latham.

An important event on the administrative law calendar is the Public Law Weekend Conference held at the Australian National University. In November 2001, the President attended the weekend. One theme of the conference was the intersection between constitutional and administrative law.

Council of Australasian Tribunals

There is great value in tribunal members and tribunal heads meeting to discuss common concerns in the operation of tribunals. Despite the increasing reliance on tribunals (as opposed to courts) to achieve justice in terms of individuals' relationship with Government as well as each other, there was no national body through which tribunals can come together to examine and compare ideas, working methods,

organisation and management, member training and support programs. To respond to these needs a proposal for a Council of Australian Tribunals (COAT) was developed by the Administrative Review Council and supported at a meeting of Commonwealth, State and Territory tribunal heads on 3 October 2001. The proposal was considered at the AIJA Tribunals Conference in Melbourne on 6 June 2002 and was expanded to include New Zealand tribunals. The Council will be known as the Council of Australasian Tribunals. The President is a member of the Interim Committee of COAT.

APPENDICES

Appendix A: List of Members

[Insert excel spreadsheet titled Members List for AR 2002 v3 FINAL VERSION]

Appendix B: Legislation

Principal Legislation

Administrative Decisions Tribunal Act 1997
Administrative Decisions Tribunal (General) Regulation 1998
Administrative Decisions Tribunal Rules (Transitional) Regulation 1998

Primary Statutes

Accommodation Levy Act 1997
Adoption Information Act 1990
Adoption of Children Act 1965
Agricultural Livestock (Disease Control Funding) Act 1998
Agriculture Tenancies Act 1990
Animal Research Act 1985
Anti Discrimination Act 1977
Apiaries Act 1985
Architects Act 1921
Betting Tax Act 2001
Births, Deaths and Marriages Registration Act 1995
Boxing and Wrestling Control Act 1986
Building and Construction Industry Security of Payment Act 1999
Charitable Fundraising Act 1991
Child Protection (Offenders Registration) Act 2000
Child Protection (Prohibited Employment) Act 1998
Children and Young Persons (Care and Protection) Act 1998
Children (Care and Protection) Act 1987
Coal Industry Act 2001
Community Justice Centres Act 1983
Community Services (Complaints, Appeals and Monitoring) Act 1993
Conveyancers Licensing Act 1995
Co-operative Housing and Starr-Bowkett Societies Act 1998
Dangerous Goods Act 1975
Debits Tax Act 1990
Disability Services Act 1993
Duties Act 1997
Education Act 1990
Electricity Supply Act 1995
Employment Agents Act 1996
Entertainment Industry Act 1989
Environmental Planning and Assessment Act 1979
Fair Trading Act 1987
Firearms Act 1996
First Home Owner Grant Act 2000

Fisheries Management Act 1994
Food Act 1989
Food Production (Safety) Act 1998
Forestry Act 1916
Freedom of Information Act 1989
Gaming Machine Tax Act 2001
Gas Supply Act 1996
Health Insurance Levies Act 1982
Home Building Act 1989
Hunter Water Act 1991
Impounding Act 1993
Insurance Protection Tax Act 2001
Land Tax Act 1956
Land Tax Management Act 1956
Legal Profession Act 1987
Local Government Act 1993
Motor Accidents Compensation Act 1999
Motor Dealers Act 1974
Motor Vehicle Sports (Public Safety) Act 1985
Mount Panorama Motor Racing Act 1989
Native Title (New South Wales) Act 1994
Non-Indigenous Animals Act 1987
Nursing Homes Act 1988
Occupational Health and Safety Act 2000
Ombudsman Act 1974
Parking Space Levy Act 1992
Passenger Transport Act 1990
Pay-roll Tax Act 1971
Pawnbrokers and Second-hand Dealers Act 1996
Pesticides Act 1999
Petroleum Product Subsidy Act 1997
Plant Diseases Act 1924
Police Act 1990
Premium Property Tax Act 1998
Privacy and Personal Information Protection Act 1998
Private Hospitals and Day Procedure Centres Act 1998
Public Health Act 1991
Public Lotteries Act 1996
Rail Safety Act 1993
Registration of Interests in Goods Act 1986
Retail Leases Act 1994
Revenue Laws (Reciprocal Powers) Act 1987
Road and Rail Transport (Dangerous Goods) Act 1997
Road Transport (General) Act 1999
Road Transport (Safety and Traffic Management) Act 1999
Security Industry Act 1997
Shops and Industries Act 1962
Stamp Duties Act 1920
Stock (Artificial Breeding) Act 1985
Surveyors Act 1929

Sydney Water Act 1994
Sydney Water Catchment Management Act 1998
Taxation Administration Act 1996
Timber Marketing Act 1977
Tow Truck Industry Act 1998
Trade Measurement Act 1989
Trade Measurement Administration Act 1989
Travel Agents Act 1986
Veterinary Surgeons Act 1986
Vocational Education and Training Accreditation Act 1990
Weapons Prohibition Act 1998
Workplace Injury Management and Workers Compensation Act 1998
Youth and Community Services Act 1973

Appendix C: List of Speeches

Judge Kevin O'Connor, President

Papers

13 August 2001

Some Reflections on the Work of Tribunals
Australasian Legal Conference, Thredbo

12 March 2002

Administrative Law in Practice
Federal Court Indonesian Judicial Training Programme, Judicial Commission of New South Wales.

28 March 2002

The Relevant Jurisdiction of New South Wales Administrative Decisions Tribunal
International Symposium on Freedom of Information and Privacy, Auckland, New Zealand

9 April 2002

Administrative Review in New South Wales
Australian Institute of Administrative Law, Queensland Chapter, Brisbane

Nancy Hennessy, Deputy President

Seminar Presentation

28 November 2001

Practice & Procedure in the Administrative Decisions Tribunal: General & Equal Opportunity Divisions, New South Wales Young Lawyers, Continuing Legal Education.

Appendix D: Financial Information

Insert: Excel Spreadsheet App D Fin Inf AR0102 FINAL VERSION

Appendix E: Statistics

Insert: Excel Spreadsheet titled "Stats for AR 2002"

Appendix F: Case Load, Time Standards

Case Load

	ALL DIVISIONS			APPEAL PANEL		
	Applications Lodged	Applications Completed	Applications Pending	Appeals Lodged	Appeals Completed	Appeals Pending
1998-1999	569*	234	335	8	2	6
1999-2000	568	599	304	44	18	32
2000-2001	666	629	341	53	45	40
2001-2002	695	642	394	61	59	42
TOTAL	2498	2104		166	124	

* Includes 257 transferred from predecessor tribunals or District Court on 6 October 1998 and 1 January 1999

Rates of appeal

Many of the appeals during 2001-2002 were related to decisions made in the previous period. Nonetheless, for the sake of obtaining a broad overview of the rate of appeals from various Divisions, the following statistics compare the distribution of appeals between Divisions for 2001-2002 with the distribution of cases between Divisions (excluding for that purpose CPPE Act decisions in the Community Services Division which are not appealable).

The comparisons are inexact as they compare the appeals lodged this year with the intake of the Divisions for this year, whereas appeals will often arise from the previous year's intake. It is also the case that an appeal can be made against *any* decision made in the course of proceedings, not just final decisions. So the number of potentially appealable decisions is greater than the number of cases that lead to final orders. Obviously most appeals do relate to cases in which there are final orders. For the purpose of statistical comparisons the cases finalised is used as the reference point.

The comparison is as follows:

Appealable Divisional Filings: No. %
General Division, 294 – 46 %
Community Services Division, 11 – 2 %

Appeal Filings, No, %
24 – 39 %
5 – 8 %

Revenue Division, 48 – 8 %	1 – 2 %
Legal Services Division, 38 – 6 %	5 – 8 %
Equal Opportunity Division, 108 – 17 %	19-31 %
Retail Leases Division, 137 – 21 %	7-12 %

Time Standards

The following standards commenced operation on 1 March 2001.

<p>General Division (<i>other than professional discipline matters</i>)</p> <p>Community Services Division</p> <p>Retail Leases Division</p> <p>Revenue Division</p> <ul style="list-style-type: none"> • 85 % of matters disposed of in less than 6 months • 100 % of matters disposed of in less than 1 year
<p>Equal Opportunity Division (<i>other than review matters</i>)</p> <ul style="list-style-type: none"> • 80 % of matters disposed of in less than 1 year • 100 % of matters disposed of in less than 2 years
<p>Professional Disciplinary Decisions</p> <p>Legal Services Division</p> <p>General Division</p> <ul style="list-style-type: none"> • 90 % of matters disposed of in less than 9 months • 100 % of matters disposed of in less than 1 year
<p>Appeals</p> <p>Appeals from appealable decisions of the Tribunal, all divisions</p> <ul style="list-style-type: none"> • 80 % of matters disposed of in less than 6 months • 100 % of matters disposed of in less than 1 year

As at 30 June 2002 the Tribunal's performance against those standards was:

<p>General Division (<i>other than professional discipline matters</i>)</p> <p>Community Services Division</p> <p>Retail Leases Division</p> <p>Revenue Division</p> <ul style="list-style-type: none"> • 65 % of matters disposed of in less than 6 months • 90 % of matters disposed of in less than 1 year • Clearance ratio* – 86%
<p>Equal Opportunity Division (<i>other than review matters</i>)</p> <ul style="list-style-type: none"> • 64 % of matters disposed of in less than 1 year • 83 % of matters disposed of in less than 2 years • Clearance ratio* – 98 %
<p>Professional Disciplinary Decisions</p> <p>Legal Services Division, and</p> <p>Veterinary Surgeons matters (General Division)</p> <ul style="list-style-type: none"> • 50 % of matters disposed of in less than 9 months • 56 % of matters disposed of in less than 1 year • Clearance ratio* - 100 %

Appeals

Appeals from appealable decisions of the Tribunal:

- 68 % of matters disposed of in less than 6 months
- 85 % of matters disposed of in less than 1 year
- Clearance ratio* - 80.5

* 'Clearance ratio' is the percentage of cases disposed of divided by cases lodged over the last 6 months. Note that the term 'clearance ratio' is used to describe the position over 12 months in the earlier statistics relating to Case Load.