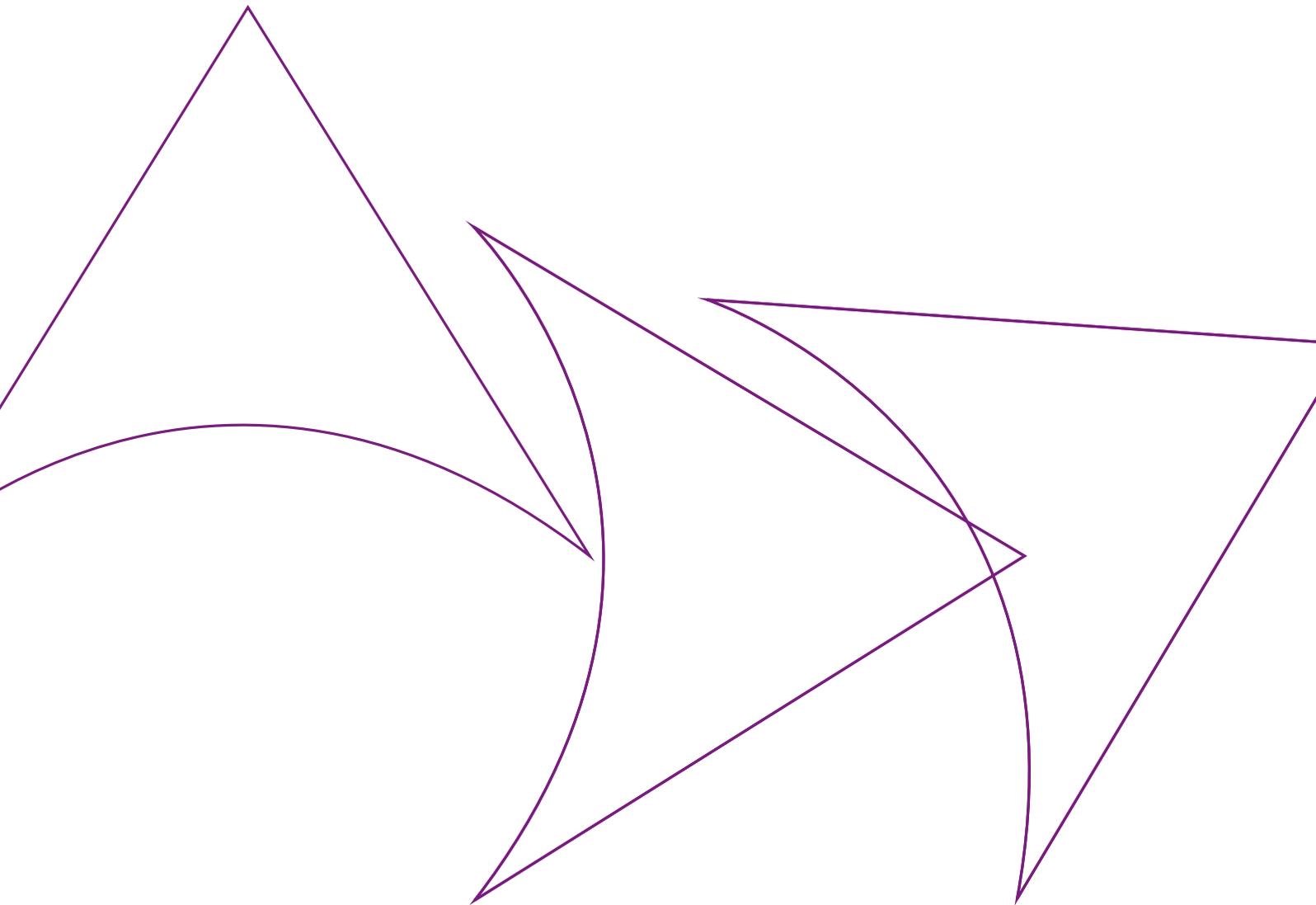




# Administrative Decisions Tribunal

New South Wales





Administrative Decisions Tribunal  
New South Wales

The Hon. Bob Debus  
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 sixth annual report of the Tribunal, covering the period 1 July 2003 to 30 June 2004.

Yours sincerely,

Judge KEVIN O'CONNOR AM

President

15 October 2004

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# The Year in Review

The Tribunal had another productive year. There were 908 lodgments at the Divisional level and 93 appeals (of which 28 were external appeals against decisions of the Guardianship Tribunal). The Tribunal disposed of 901 matters (791 at Divisional level and 110 appeals). The pending business at year's end (30 June 2004) comprised 532 matters (502 Divisional matters, 30 appeals). While the Tribunal achieved its highest-ever disposal rate by volume (901 as compared to 884 last year), the proportion of matters on hand increased due to the substantial increase in lodgments this year (up by 18%).

In the case of appeals the new category of business – external appeals – accounted for the entire increase. This year's number of internal appeals (that is, appeals against Divisional decisions) was 65 compared to 72 in the previous year (there was also one external appeal lodged last year).

During the year the Tribunal began to deal regularly with guardianship and protected estates matters. There were 40 lodgments (28 external appeals against Guardianship Tribunal orders and 12 applications for review of decisions made pursuant to those orders by the Protective Commissioner or the Public Guardian).

In light of these trends the Tribunal has re-examined listing practices with the aim of ensuring that in the year 1 July 2004 to 30 June 2005 a greater number of matters is finalised than is lodged in order to avoid a further increase in the number of matters on hand at year's end.

Two events of special significance were held during the year.

On 1 August 2003 a function was held at the Governor Macquarie Tower to celebrate the first 25 years of the Equal Opportunity Jurisdiction in New South Wales. Originally under the 1977 anti-discrimination legislation the power to hear complaints and make orders was vested in the



*Former and current Heads of Equal Opportunity Jurisdiction at Reception, 1 August 2003: Judge David Patten (1995-97), Judge Gay Murrell (1997-99), Judge Megan Latham (1999-2002), Magistrate Nancy Hennessy (2002-date), the Hon Jane Mathews (1985-87), Judge Geoff Graham (1987-92).*

Anti-Discrimination Board (ADB) itself. On the recommendation of an early ADB President (the Honourable Paul Stein) the jurisdiction was conferred on the new Equal Opportunity Tribunal in 1981. The Equal Opportunity Division of this Tribunal is the successor to that Tribunal.

The occasion provided an opportunity to honour the contribution made by so many to the success of the jurisdiction in New South Wales and the role it has played both here and across Australia in strengthening protection of the human rights supported by the *Anti-Discrimination Act 1977*. The function took the form of a seminar and reception. John Basten QC addressed the history of the jurisdiction in New South Wales and its notable milestones. The Honourable Jane Mathews responded. Ms Mathews, then a Judge of the District Court, was an early President of the Equal Opportunity Tribunal and her tenure saw a number of landmark decisions. Those in attendance included six of the eight persons who have served as heads of jurisdiction since 1981, leading practitioners in the field, long-term members of the Tribunal past and present, representatives of community groups and community legal services with a special connection to the legislation, and distinguished human rights leaders.

On 5 September 2003 the Tribunal held its fifth

annual professional development day for members on the theme of "Tribunals in Practice." The day was opened by the Chief Justice, the Honourable James Spigelman AC. It was held at the Australian Museum and attended by almost 100 members.

In previous annual reports I have noted the extent to which the Australian justice system now depends on tribunals as distinct from courts for resolution of disputes according to law. Yet the world of tribunals has tended to remain a fragmented one, with the judicial role performed by an array of full-time and part-time members. I have welcomed the initiatives that have led to the creation of a Council of Australasian Tribunals (COAT). During the year COAT New South Wales got off to a good start. On 28 May 2004 a successful all day conference was held, again at the Australian Museum, and over 100 members of State and Commonwealth tribunals located in NSW attended. COAT New South Wales has 170 members, and its objectives include the provision of training and support to tribunal members, the promotion of lectures, seminars and conferences about tribunals and the establishment of a network whereby members can discuss issues of common concern.

The national conference of Australasian tribunals was held in Brisbane in June 2004. It attracted 250 participants, mainly from Australia and New Zealand, with some from Asian countries and Northern Ireland. The success of this event again points towards the importance of tribunals in the Australian legal fabric.

I took extended leave from mid-September 2003 to the end of January 2004. During that time full-time Deputy President Hennessy acted as President and part-time Deputy President Chesterman agreed to serve on as full-time a basis as he could. May I express my appreciation for their contribution to the smooth operation of the Tribunal during that time.

During the year part-time Deputy President Alan



*Judge Kevin O'Connor AM*

Hogan retired from the law after making a distinguished contribution in many capacities, most notably, in my view, as a founder of courses of college-based practical legal training for law graduates. At the Tribunal we very much appreciated his being available for more than a year to assist with the case load in legal profession discipline matters and in appeals both in that jurisdiction and in the revenue jurisdiction.

The Registry continues to serve well the users of the Tribunal, most importantly the many people who conduct their cases without any legal assistance. Registry practices, our documentation and other sources of information such as the web site, are all designed to be accessible to users who do not have formal legal knowledge.

Judge Kevin O'Connor AM  
President

# Our Objectives

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The Tribunal's objectives are set out in the objects clause of the legislation establishing the Tribunal, the *Administrative Decisions Tribunal Act 1997* (the ADT Act). Section 3 states:

### 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

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 that part of the business of the Tribunal that can be said to be of an ‘administrative’ or public law character (proceedings to which a private citizen and a government agency or a body exercising public power are parties), on the one hand; and that, on the other hand, which is of a ‘civil’ or private law character (disputes between private parties).

Three Divisions deal substantially or exclusively with administrative 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, 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 to which a government agency is the respondent.
- *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 as its ultimate duty is to the public interest, when considering whether a member of a profession should be removed from the public register and prohibited from continuing to practise.

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

The Tribunal has disciplinary functions affecting other professions located in the General Division. A short report on them is given after the Legal Services Division report.

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. This Division hears claims made under the *Retail Leases Act 1994* by parties to retail shop leases.

## Appeal Panel

The Tribunal has an Appeal Panel, which hears internal appeals from decisions made by the Divisions of the Tribunal and external appeals from other decision-makers (principally the Guardianship Tribunal), as prescribed by Chapter 7 of the ADT Act.

In the following presentation, the Divisions have been grouped according to the conceptual category into which their work mainly or wholly falls, i.e. ‘administrative review’, ‘professional discipline’ and ‘civil’.

## General Division

### Structure and Functions

The President is Divisional Head of the General Division. The General Division is responsible for dealing with most of the applications for review filed in the Tribunal. It is also responsible for making original decisions in some categories of professional discipline. Most matters are dealt with by a judicial member sitting alone.

After an application is lodged it is referred either to a directions hearing or to a planning meeting.

The planning meeting is the method used in all Freedom of Information (FOI) and Privacy cases. The main aim of the planning meeting is to seek to ascertain the extent to which the dispute is capable of complete or partial resolution without hearing. The planning meeting is listed for a 45 minute session. The agency is usually represented by the FOI/Privacy officer and a legal officer. The applicant almost always attends in person without legal assistance.

The directions hearing is used for other matters.

### Case Load

This year's proportion of filings in the General Division as compared to the rest of the Tribunal remained comparable with previous years. Of the 908 applications filed in the Tribunal at Divisional level, 397 (43%) went to the General Division.

There was an increase in filings of 53 (15%) in keeping with the trend across the Tribunal. The disposal rate was less than the number of filings meaning that business on hand at the end of the year increased as against last year. The number of matters pending was 198 as compared to 144 last year.

Of the matters disposed of during the year,

338 were applications for review.

Of these, 156 (46%) were resolved prior to hearing. The number of FOI and Privacy matters (where planning meetings are routine) that produced final decisions after hearings was 23 (19 FOI, 4 Privacy) as compared to an intake level around 90 (88 matters in 2002-03; 91 matters in the current year). While it is an inexact comparison (the final orders will link to cases in both groups), these figures suggest that the proportion of matters in the FOI/Privacy group that are resolved through the planning meeting process is around 75% with a bias, as might be expected, towards Privacy matters where the proportion is a little higher (around 80%) with FOI around 65-70%.

Of the 182 review cases that went to hearing, 112 of the decisions were affirmed, 10 applications were found to be without jurisdiction (total 67%) and 60 matters were the subject of orders which set aside or varied in some way the primary decision (33%).

Last year the comparable statistics were 117 (35%) withdrawn, resolved or dismissed prior to hearing; while 210 decisions went to hearing of which 45 were set aside or varied in some way (21% of the group that went to hearing).

During the year, long hearings occurred in relation to two cases involving licences administered by the Office of Fair Trading – an 8 day hearing in relation to disciplinary action taken against travel agent's licences: *Travel Action Pty Ltd; Sascha Frugtniet; Suzanne Frugtniet and Brian Frugtniet v Commissioner for Fair Trading* [2003] NSWADT 223 (decisions to disqualify certain persons from holding travel agent's licence affirmed, as well as other disciplinary decisions in relation to a company); and a 4

day hearing in relation to action taken against a contractor licence: *Hutchings Electrical Pty Limited & Anor v Director General, Department of Fair Trading* [2004] NSWADT 23 (principal decision of permanent disqualification affirmed). Cases of this length are unusual in the General Division. Most cases are listed for half a day or a full day, and are completed within that time. In FOI cases by far the greater proportion of member time is spent in perusing and assessing the documents in dispute, with many cases involving large numbers of documents.

These are the main components of the business of the Division:

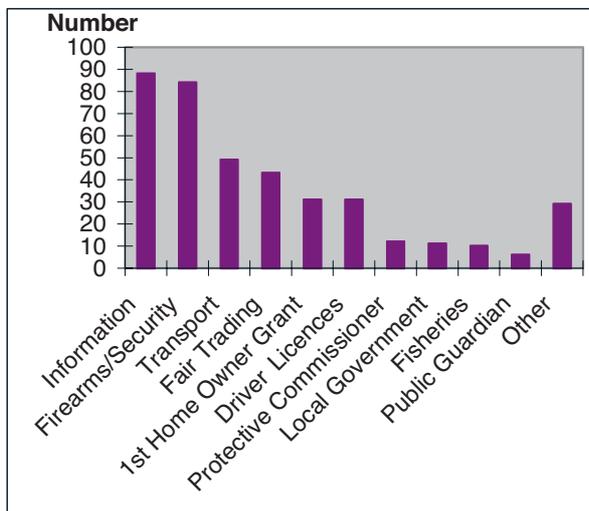
1. Review of agency decisions or agency conduct in respect of information. Total, 88 applications (22% of all applications lodged in the Division) comprising 67 under the *Freedom of Information Act* and 21 under the *Privacy and Personal Information Protection Act*. This was a slight fall from last year when the total was 91 (64 FOI; 27 PPIPA).
2. Review of decisions by the Police Commissioner relating to Firearms and Security Industry licences. Total, 84 (21%) (firearms, 61; security industry, 23) up on last year's total of 70 (46 and 24 respectively).
3. Review of decisions of Director General Department of Transport (public passenger vehicle authorities, mainly taxi driver authorities). Total, 49 (12%) up on last year's total of 41.
4. Review of decisions of the Commissioner, Fair Trading made under a variety of Fair Trading portfolio statutes (*Conveyancers Licensing Act, Fair Trading Act, Home Building Act, Motor Dealers Act, Motor Vehicle Repairs Act, Pawn Brokers and*

*Second-hand Dealers Act and Property Stock and Business Agents Act*). Total 43 (11%), as compared to 33 last year.

5. Review of decisions of the Commissioner, State Revenue under the First Home Owner Grant scheme. Total, 31 (8%), as compared to 19 last year.
6. Review of Police decisions to suspend immediately driver's licences. Total, 31 (8%), down on last year's total of 48.
7. Review of decisions of the Protective Commissioner and Public Guardian. Total, 18 (12 and 6 respectively) (4.5%), new jurisdiction.
8. Applications for dismissal from civic office pursuant to *Local Government Act*, 11 (2.7%), an area of activity in Council election years.
9. Review of decisions of Director General, Ministry of Fisheries (commercial fishing licences). Total, 10 (2.5%), last year 13.

The remaining 29 applications (7%) fell across a variety of Acts.

**2003-04 Case Distribution**



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One category of business (review of first home owner grant decisions) more naturally belongs to the Revenue Division, which specialises in review of decisions of the Chief Commissioner, State Revenue. A legislative amendment to effect such a transfer has been requested.

### **Significant Themes**

The new Guardianship and Protected Estates jurisdiction gave rise to a number of decisions. The General Division deals with reviews of decisions of the Protective Commissioner and the Public Guardian. The early cases have dealt with decisions to sell or lease property owned by a protected person, and decisions as to accommodation of a protected person. The judicial member assigned to this class of business comes from the Guardianship and Protected Estates list of members. The remainder of this new jurisdiction forms part of the work of the Appeal Panel (external appeals against Guardianship Tribunal orders). That subject is dealt with in the Appeal Panel section of this report.

There continued to be a steady flow of significant rulings in the FOI area. Many of these rulings are the subject of summary and expert commentary in the *New South Wales Administrative Law* service (Robinson (ed), LBC). A similar commentary has just been included in that service covering the Tribunal's rulings under the *Privacy and Personal Information Protection Act*.

### **Legislative Changes**

There were no significant legislative changes affecting the work of the General Division in the current year.

### **Published Decisions**

The General Division issued 121 published decisions during the year in respect of the 182 matters that went to final hearing. Last year the figure was 157 in comparison to 210 that went to hearing. One class of case is routinely resolved by ex tempore decisions – applications for review of decisions made by a police officer under the *Road Transport (General) Act* to suspend a driver's licence following an adverse roadside breath test reading (or refusal to undertake a test). There were 31 applications for review in this category this year (and 48 last year). Once that group is taken into account, it will be seen that about 80% of remaining matters are the subject of reserved decisions. Last year it was close to 100%. The difference flows from a greater emphasis this year on giving ex tempore decisions.

# Revenue Division

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The Revenue Division deals with applications for review of decisions made under State revenue law. A Divisional Head has yet to be appointed, with the President currently taking responsibility for the conduct of the Division.

## Structure and Functions

A judicial member sitting alone conducts directions hearings and hears applications. The members assigned to the Division all have substantial tax law expertise. In contrast to the usual position in merits review where no onus is cast on parties, State revenue law does cast an onus on the applicant/taxpayer to satisfy the Tribunal that a determination by the Chief Commissioner, State Revenue should be disturbed. In practice this has not proved to be a significant matter. All applications for review are first the subject of a determination by the Commissioner. The official file is tendered to the Tribunal. It normally contains a comprehensive record of the applicant's factual claims and legal submissions. Often at hearing the circumstances are agreed, and the task for the Tribunal is one of applying the law to the facts.

## Case Load and Significant Themes

The Division received 56 applications during the year, one more than last year. It disposed of 56 applications, leaving 34 on hand at the end of the year. The disposal rate, therefore, reached the desirable number of 100% (disposals compared to receipts), as compared to 80% in the previous year. As to the distribution of applications between the various revenue laws, this year there was a significant increase in filings relating to Payroll Tax (up from 5 to 16) and a significant decrease in filings under the *Taxation Administration*

*Act*, which deals principally with Interest and Penalty Tax, down from 26 to 10. Other categories remained similar (see Appendix E). Of the 56 disposals, 30 did not go to hearing. Of the 26 that went to hearing, 30 decisions were affirmed and 8 resulted in the decision being set aside (7) or varied (1).

The cases where decisions favourable to the taxpayer were made covered such matters as: imposition of duty in NSW on several instruments of security which collectively affected property within and outside NSW without giving a credit for duty paid in Western Australia; exemption from land tax on the basis that the land is used for primary production; whether a mortgage debenture was entitled to a refinancing exemption from duty; the principles relevant to aggregation of dutiable transactions (subject to appeal); and the applicability of a parking space levy.

# Community Services Division

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The Divisional Head is Mr Tom Kelly, part - time Deputy President.

## **Structure and functions**

The Division is the successor to the Community Services Appeals Tribunal. It hears both applications for original decisions and merits reviews. At present most applications are for original decisions, namely applications by persons for exemption from the provisions of the *Child Protection (Prohibited Employment) Act* (CPPE Act) so that they can work with persons under the age of 18 years. The review applications mostly relate to decisions about custody of foster children; disability funding; and withdrawal of certain licences.

When hearing a merits review application the Tribunal sits as a three member panel, comprising a legally qualified member and two other members who have experience or knowledge directly relevant to the subject matter of the proceedings. In Prohibited Employment matters the Tribunal usually sits with a judicial member only. Hearings are conducted in a less formal and adversarial manner than in most other Divisions of the Tribunal, especially in the majority of applications where the applicant is not represented and the government agency is represented.

If a case is suitable for mediation, a member of the Division (who will not sit on the hearing of the matter) conducts a mediation session before the hearing at no expense to the parties. Certain matters are never considered suitable for mediation, such as child custody reviews where serious child abuse is alleged and prohibited employment applications. All matters that were sent for mediation during the year were settled to the satisfaction of both parties and a formal hearing was not proceeded with.

## **Case Load**

There were a total of 43 applications during the year, as compared to the 57 last year. 24 of those applications were under the CPPE Act, a 50% decrease on last year. The remaining 19 applications were child custody applications regarding foster children, up from 5 last year.

The reduced number of filings may be due to two factors. Firstly, an amendment to the CPPE Act came into force in February 2003 giving applicants the right to apply first to the Commission For Children and Young People and then to the Tribunal, as an alternative to coming directly to the Tribunal. Secondly, the potential applicants who have been working with children since before the CPPE Act commenced have all been identified and have made their applications to the Tribunal. The Tribunal is now left with a greater proportion of more difficult and contentious applications than before.

Various sections of the *Children and Young Persons (Care and Protection) Act 1998* came into force on 15 July 2003. This had the effect of broadening the definition "authorised carer" which is a category of persons who can challenge a decision of the Minister of Community Services to remove a foster child. This resulted in an initial increase in the number of applications filed. However that increase was not sustained in the second half of the year, possibly because the Department started providing more detailed information in support of its decisions at the time of the decision. The overall consequence for the Tribunal may be an increase in the number of more complex matters that are fully litigated.

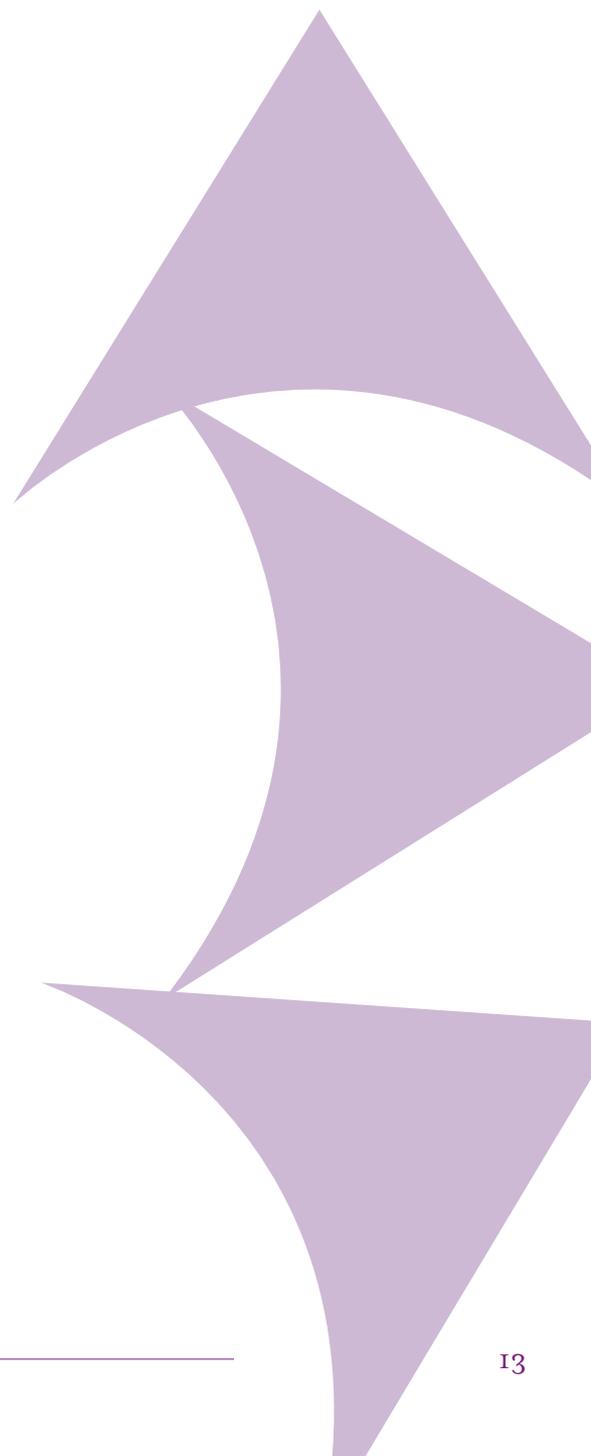
## **Significant cases and themes**

Most of the contentious cases heard in the Division necessitated the consideration of expert evidence, usually psychiatric or

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psychological. As most applicants are unable to afford legal representation, let alone the cost of expert evidence, the respondent government agency is almost always the only party with the financial resources to be able to present expert evidence. The Tribunal is not necessarily bound to accept such evidence even if it is the only expert evidence that is available. The principles involved in accepting and considering such expert evidence are fully discussed by Judicial Member Britton in *FD v Commission for Children and Young People* [2003] NSWADT 261, where the evidence of the only expert was not accepted.

Government agencies in these circumstances have great power and a great responsibility in choosing which experts to refer an applicant to and which reports to produce to the Tribunal. It is always open to the Tribunal by virtue of s 73(1) and 73(5)(b) of the ADT Act to obtain its own expert opinion, although the Division has so far not done this.



## Legal Services Division

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The Divisional Head is Acting Judge John Nader RFD QC, part-time Deputy President.

### **Structure and Functions**

The Division's principal function is to hear and determine applications for disciplinary orders brought against legal practitioners by the Councils of the Law Society and the Bar Association, or the Legal Services Commissioner. The Division sits as a three member panel, which includes one lay member.

### **Case Load and Significant Themes**

There were 23 matters pending at the end of last year. There were 49 new applications filed during the year. There were 30 final decisions. The number of matters pending is 42. Seven practitioners were deregistered. Eleven were the subject of a reprimand (with one of those also fined). In total there were adverse orders entered in 25 of the 30 matters.

The kinds of conduct that led to practitioners being struck off the Roll included: repeated breach of standards, such as failures to respond to trust account inspector's enquiries, failures to keep accounts that reflect the true nature of the trust account, failures to attend court, wilful breach of requirement to account for trust moneys; failure to disclose costs, failure to disclose billing arrangements, unnecessary service and overcharges; misleading client, failure to carry out instructions, and failure to reach reasonable standards of competence and diligence.



*Left to Right: Elayne Hayes, Conrad Staff, Michael Barnes, Sharron Norton SC, Legal Services Division, Professional Development Day, 5 September 2003*

# Other Professional Discipline

## Functions of the Tribunal

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The following jurisdictions form part of the General Division.

*Veterinary Surgeons:* The Veterinary Disciplinary Panel of the General Division heard no new applications for disciplinary orders during the year. In October 2003, the Appeal Panel set aside a number of the findings made in three inquiries finalised in 2002 and 2003 into the conduct of a registered veterinary surgeon. The remaining findings were remitted to the Panel for the making of final orders.

*Accredited Certifiers:* The office of accredited certifier is one conferred under the provisions of the *Environmental Planning and Assessment Act 1979*. It is a relatively new office created to help speed up the development approval process. Accredited certifiers belong to the private sector and can exercise some of the decision-making functions once vested exclusively in relevant authorities such as local councils. They are subject to

disciplinary procedures. These include the possibility of referral of their conduct for inquiry by the Tribunal. Proceedings so far have been constituted by a panel comprising a presidential judicial member of the General Division and a non-judicial member who is an accredited certifier of standing.

During the year there were two disciplinary inquiries into the conduct of accredited certifiers. In one the decision was reserved as at the close of the year. In the other the certifier had been found guilty of unsatisfactory professional conduct in two respects: one, he signed the application for a construction certificate for the development and then issued the construction certificate applied for; and two, he did not issue the occupation certificate for the development when he should have, as he was the principal certifying authority. A hearing as to the disciplinary order has been held, and that decision is reserved.

## THE 'CIVIL' SECTOR

# Equal Opportunity Division

The Divisional Head is Magistrate Nancy Hennessy, full-time Deputy President.

### Structure and Functions

The Equal Opportunity Division conducts inquiries into complaints that allege breaches of the *Anti-Discrimination Act 1977*. A panel of three sits on each hearing – one judicial member and two non-judicial members who have expertise in various areas of discrimination. There are 16 judicial members, and 21 non-judicial members, all of whom are part-time members.

A complainant must first lodge a complaint with the President of the Anti-Discrimination Board (ADB). If the complaint cannot be conciliated or it cannot be resolved for some other reason, it may be referred to the Tribunal. During the financial year the Tribunal developed a new form for the President of the ADB or his delegates to complete when referring complaints to the Tribunal. That form contains specific details about the nature and scope of the complaint and will be used as a focus when conducting case conferences. The new form was initially introduced as a pilot and has now been adopted by the ADB when referring all complaints.



*The Hon Elizabeth Evatt at Equal Opportunity Jurisdiction Reception, 1 August 2003*

### Case load

The President of the ADB referred 201 new complaints to the Tribunal during the financial year. This was an increase of 34% on last year's number of referrals. This increase occurred mainly during the December-January period and was not sustained throughout the entire year. The Tribunal also has a limited jurisdiction to review decisions of the President of the ADB. There was no application to review a decision of the President to decline to entertain a complaint. One hundred and fifty six matters were disposed of during the year, an increase of 3% from last year, and 150 matters remained pending at the end of the year.

Of the 156 disposals a total of 107 were settled or withdrawn, 7 were summarily dismissed and 42 matters proceeded to substantive hearing. Of those 42, 33 were dismissed. Orders were made in favour of the applicant in 9 cases. The low proportion of matters in which an order is ultimately made in favour of an applicant comes about because meritorious matters are generally settled either through mediation or, less frequently, direct negotiation between the parties. There is a significant incentive for parties to resolve the dispute without having a hearing because of the high cost of litigation and the fact that the Tribunal can only award a maximum of \$40,000 in damages.

The Tribunal conducts a preliminary case conference at which parties are offered the opportunity of mediation if their case is suitable. Of the 156 original complaints that were finalised during the year mediation was conducted in 76 matters. Of those 76 matters, 63 (83%) settled at or after mediation and 13 (17%) proceeded to a hearing. During the financial year we

engaged the Australian Commercial Disputes Centre to advise as to possible improvements to our policy and procedures on mediation. As a result, a new mediation Practice Note was issued (PN 16/04) and a revised Agreement to Mediate implemented. An improved Survey for participants in mediation is also being developed.



John Basten QC and the Hon Jane Mathews addressing Equal Opportunity Jurisdiction Seminar, 1 August 2003

A complaint may allege more than one ground of discrimination. The most frequently cited grounds of discrimination were disability (61), race (50), sex (37), sexual harassment (35), and age (21), followed by discrimination on the grounds of homosexuality (11), a person's responsibilities as a carer (11), marital status (8) and being a transgender person (5). There were three complaints of homosexual vilification, two complaints of racial vilification and one complaint of transgender vilification. The number of complaints in each area has remained fairly constant since last year, except in relation to racial discrimination which has increased from 34 complaints in 2002-2003 to 50 in 2003-2004.

The Equal Opportunity Division's time standards for disposal of matters is 80% of

matters to be finalised within 12 months and the remaining 20% within 2 years. Despite the significant increase in the number of referrals compared with last financial year, the Division exceeded the target for the number of matters disposed of within 12 months. Of the 156 cases disposed of during the year 130 (83%) were disposed of within 12 months and a further 20 (13%) in less than 2 years. The remaining six matters were more than two years old for reasons that are beyond the Tribunal's control (such as related pending proceedings in other jurisdictions).

#### **Significant cases and themes**

Some of the significant issues decided by the Tribunal were that:

- The Department of Community Services is providing a service to people who apply to become foster parents so that discrimination against them by refusing to provide that service may breach the *Anti-Discrimination Act*. That decision was affirmed by the Supreme Court on referral (see [2003] NSWSC 1241);
- A complaint should not generally be dismissed as lacking in substance before the complainant has given evidence unless it is clear that the complaint is so hopeless that it should be summarily brought to an end. If the application for dismissal is based on the insufficiency of the complainant's evidence, the application should be made after the complainant's case has been heard (see [2003] NSWADTAP 65 and [2003] NSWADTAP 62);

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- An employer will be unlawfully discriminating against an employee on the ground of disability if the employee is disciplined for taking genuine sick leave to which the employee is entitled (see [2003] NSWADTAP 67); and
  - Insulting a person in the course of providing them with a service does not relate to the terms on which the service is provided, but rather to the manner in which the service is provided. Since s 38M of the *Anti-Discrimination Act* relating to the provision of services to a transgender person does not cover the manner in which the service is provided, insults relating to that status are not in breach of the Act (see [2004] NSWADT 89).

# Retail Leases Division

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The Divisional Head is Acting Judge Michael Chesterman, part-time Deputy President.

## Structure and Functions

This year, three new Judicial Members and an existing Judicial Member of the Tribunal were assigned to the Division. Retail tenancy claims are heard by a Judicial Member sitting alone. Unconscionable conduct claims are heard by a panel headed by a specially qualified Judicial Member.

## Case load

At the beginning of the year, 67 applications were pending. During the year, 162 applications were filed and 165 were disposed of, leaving 64 applications pending. The average number of applications disposed of each month was 13.75.

In the 162 new applications, 127 (78.4%) contained retail tenancy claims only, two contained unconscionable conduct claims only (1.2%) and 33 (20.4%) contained both types of claim. Last year, the equivalent percentages (79%, zero and 21% respectively) were remarkably similar. In some of the 'combined' claims this year, the unconscionable conduct claim was subsequently dropped.

Of the 165 applications that were disposed of, 122 (74%) were settled. In all but three of the 122 applications that were settled, no hearing took place. The Tribunal therefore continues to maintain a high settlement rate within this Division. Many of the settlements were achieved at mediations conducted by the Retail Tenancy Unit. Under section 68 of the *Retail Leases Act*, the Tribunal may not hear an application unless the parties have unsuccessfully attempted mediation or the Tribunal is satisfied that mediation is unlikely to resolve the dispute. At directions hearings, Tribunal members

insist on strict compliance with this requirement.

Out of the 43 applications that were determined following a hearing, 21 were dismissed (including two on the ground of lack of jurisdiction). In the remaining 22, orders were made.

## Significant themes

The matters raised in the 43 cases decided within the Division this year included:

- Whether the Tribunal has jurisdiction to determine claims of misleading and deceptive conduct under trade practices legislation.
- The scope of the Tribunal's power to award damages.
- The scope of the Tribunal's power to order rectification of a retail lease.
- The consequences of a lessor requiring the lessee to relocate.
- The consequences of a lessor's failure to fulfil a contractual obligation to register the lease.
- The consequences of failure by a lessee to observe precisely the requirements stated in the lease for exercising an option of renewal.
- What types of conduct by a lessor or a lessee amount to repudiation of the lease agreement.
- The nature of unconscionable conduct as defined in the *Retail Leases Act*.
- The assessment of damages for loss of a commercial opportunity.
- The assessment of compensation for disturbance of a lessee's right to possession.
- The grounds justifying an order for costs in a retail lease dispute.

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The last issue in this list features in a significant proportion of the cases decided. The Tribunal has endeavoured to work out an appropriate reconciliation between the important principle, stated in s 88 of the ADT Act, that costs ordinarily may not be awarded, and the view that in a commercial dispute the successful party should recover costs.

#### **Legislative Developments**

Judicial Members of the Division have continued to participate in consultations forming part of the Government's National Competition Policy Review of the *Retail Leases Act 1994*. The Division took responsibility for preparing two submissions by the Tribunal to the Review, dated August and November 2003. Meetings are continuing between Division members, representatives of the Department of State and Regional Development (which is conducting the Review) and other interested parties.

The issues raised in the Tribunal's two submissions include:

- The range of leases and other similar transactions that should be governed by the *Retail Leases Act*.
- The use of certification by solicitors to ensure that parties to a prospective lease properly understand its terms and conditions.
- The role to be played by disclosure statements.
- The Act's provisions regarding consent by a lessor to assignment by the lessee.
- Conditions governing a lessor's right to recover outgoings from the lessee.
- The scope of the Tribunal's jurisdiction

over claims arising out of retail leases, including whether it should have jurisdiction to declare lease agreements unfair and/or to determine claims of misleading and deceptive conduct under trade practices legislation.

- The imposition of special requirements on the hearing of unconscionable conduct claims by the Tribunal.

This last issue, which was discussed in the Tribunal's Annual Report 2002-2003, continues to create listing difficulties for the Tribunal.

# Appeal Panel

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The President is responsible for overall management of the Appeal Panel list.

## **Structure and Functions**

An Appeal Panel is comprised of a presidential member of the Tribunal, a judicial member and a non-judicial member. The non-judicial member and one of the other two members must be from the Division under appeal. The usual practice is for the President or the Divisional Head of the relevant Division to preside at appeals. Where such a person has sat at first instance and his or her decision is the subject of appeal, another presidential member is listed to preside.

In the case of external appeals, the composition is the same as to the number and status of members, with the President being required to have particular regard to certain factors when constituting the Panel. For guardianship and protected estate appeals the practice is to sit a judicial member and a non-judicial member who belong to the Guardianship and Protected Estates list of members.

The ADT Act's provision governing the nature of an external appeal is differently expressed to the one that governs an internal appeal. Internal appeals may be made on a question of law, and the Appeal Panel may grant leave to extend the appeal to a review of the merits. External appeals may be made as of right on any question of law, or by leave of the Appeal Panel on any other grounds. If the Appeal Panel grants leave to extend an internal appeal to the merits, it must decide 'what the correct and preferable decision is.' No such limitation applies to external appeals made 'on any other grounds.'

## **Case Load**

During the year the Appeal Panel began disposing of 'external appeals'. The Appeal Panel now has jurisdiction to hear appeals against most decisions of the Guardianship Tribunal. It can also hear appeals against

decisions of the Mental Health Review Tribunal and Magistrates placing a person under management under the *Protected Estates Act* (financial management orders). All external appeals this year were made against decisions of the Guardianship Tribunal.

The Appeal Panel dealt with 110 appeals during the year, of which 89 were internal appeals and 21 were external appeals. Of the internal appeals, 41 were dismissed and 35 resulted in decisions that varied or set aside the decision under appeal. The distribution of internal appeals broadly reflected the distribution of business as between the Divisions. Of the external appeals, 10 were dismissed and 4 resulted in decisions that varied or set aside the decision under appeal. The remaining appeals were withdrawn or discontinued.

The presiding members in respect of appeals during the last year were the President (21 matters), Deputy President Hennessy (21 matters), Deputy President Chesterman (18 matters), Deputy President Hogan (5 matters), Deputy President Nader (4 matters), Deputy President Latham (2 matters, matters she completed after expiry of term of office), Acting Deputy President Rees (one matter).

## **Significant Themes**

The following is a brief survey of the issues that arose in those appeals where an order varying or setting aside the decision under appeal was made. The survey includes abbreviated references to the case, so for example 03/27 means the appeal reported at [2003] NSWADTAP 27. The survey mainly organises the rulings by reference to Division rather than nature of error (e.g. procedural fairness, jurisdiction, statutory construction) with the exception of the procedural fairness cases involving s 73 of the ADT Act; and the effect on the ADT's jurisdiction of absence of internal review.

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***Freedom of Information and Privacy (Appeals from General Division)***

*Freedom of Information Act:* circumstances when expressions of grievance over workplace issues will constitute information that involves the 'personal affairs' of the author for purposes of cl 6 of the exemptions in Sch 1; misconstruction of agency's grievance resolution policy in course of making adverse finding as to 'public interest' considerations affecting access by subjects of grievances to content of grievances: 03/25; nature of inquiry required when applying exemption, Sch 1, cl 16(1)(a) (confidentiality of test methods): 03/28; tests to be applied when deciding whether to permit amendment of professional opinion contained in personal record, here a psychiatrist's report: 04/6; prior release of same documents (with author identified) by another agency ordinarily will mean that present respondent agency can not refuse to release on basis of prejudice to confidential source of information: 04/7.

*Privacy and Personal Information Protection Act:* nature of Privacy Commissioner's right to participate in proceedings (s 57), definition of 'personal information', scope of exceptions to the disclosure limitation principle, effect of direction issued under s 41 permitting additional disclosures, order making power of Tribunal considered: 03/43; need for clarity as to what conduct of the agency is put in issue by applicant, not to be strictly restricted to matters addressed by agency internal review, if variation need to ensure that agency has proper notice before adverse findings made; observations on scope of exclusion of 'publicly available publication' from meaning of 'personal information': 04/10; scope of exclusion of 'information about an individual arising out of' a complaint against police from meaning of 'personal information': 04/18, 04/21; duty of agency to disclose precisely the

conduct put in issue by applicant: 04/21 (see also below under Procedural Fairness).

***Licensing (Appeals from General Division)***

*Commercial Fishing:* finding, or necessary inference, that fisher had lodged all catch returns meant in circumstances that licence should issue regardless of fact that administrator could not now locate them all; not a case where the discretion to relieve a fisher from failure to lodge returns falls to be exercised: 03/36.

*Security Industry:* construction of meaning of 'assault' offences (mandatory ground for refusal) as it applies to sexual intercourse with under-age persons: 03/55; civil penalty order made under industrial legislation does not constitute a conviction for an offence, and therefore does not bear on licence: 03/58.

*Home Building:* principles as to when expert evidence may be excluded, mere 'bias' not sufficient to justify exclusion but goes to weight: 04/17.

***State Revenue Law (Appeals from Revenue Division)***

*Duties Act:* interpretation of provisions as to reassessment of advance payment of duty when instrument fails in its intended operation: 03/34 which was reversed by the Supreme Court restoring the Divisional decision for different reasons: [2004] NSWSC 107.

*Land Tax:* meaning of 'occupation' and 'principal place of residence' considered in circumstances where there has been short term lease of domestic residence: 03/50; determination of 'principal place of residence' in circumstances where person uses more than one residence: 03/57.

*Tax Administration Act:* discretion to remit as applied to premium rate component of interest: 04/19.

***Professional Discipline (Appeals from General Division and Legal Services Division)***

*Legal Profession:* order subjecting barrister

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found guilty of professional misconduct to period of supervision by a senior barrister held to be outside scope of the power to make orders to undertake a course of further legal education (03/29); misconstruction of evidence going to penalty leading to failure to hear actual case put by practitioner (03/33).

*Veterinary Surgeons:* refusal to recall witnesses for further cross-examination after reconstitution of inquiry found in circumstances to constitute denial of procedural fairness; expert evidence – requisite evidentiary standard not attained in relation to findings as to various matters of professional competence, findings not saved when Tribunal only includes one member expert in veterinary practice: 03/45, 47, 48, 49.

***Retail Leases (Appeals from Retail Leases Division)***

Lessor may recover outgoings not paid by lessee in breach of lease even if the lessor has not complied at the time of entry into lease with obligations regarding disclosure of outgoings: 03/24; failure to consider important element of lessee's case – the implied duty of co-operation; failure to consider loss of opportunity as a head of damages for breach; failure to provide adequate reasons for decision as to why lessee lost benefit of possible assignment: 03/53.

***Equal Opportunity (Appeals from Equal Opportunity Division)***

*Summary dismissal:* principles discussed in 03/62 and 03/65; events that occurred more than 6 months prior to lodgment of complaint with Anti-Discrimination Board time-barred, different position applies in relation to events giving rise to victimisation complaint: 03/62; matters relevant to victimisation complaint not confined by ground of unlawful discrimination on which main complaint relies: 03/65.

***Guardianship and Protected Estates (External Appeals, Appeals from General Division)***

Role of Guardianship Tribunal as party to appeal: 03/59; failure to put one significant matter to current manager about his alleged inability to continue to manage mother's affairs: 03/59; failure to address sufficiently statutory considerations in reaching decision to revoke guardianship order: 04/3.

***Other***

*Farm Debt Mediation:* need for Rural Assistance Authority to satisfy itself that a certificate under s 11 is issued in respect of current creditors: 04/24.

***Jurisdiction and Internal Review***

Absence of internal review deprives Tribunal of jurisdiction unless power to dispense under ADT Act s 55(2)(b) exercised: 04/28.

***Procedural Fairness and section 73 of the ADT Act***

The combined effect of the common law and s 73 of the ADT Act, which lays down standards to be observed by the Tribunal in its procedures including at hearing, was considered in several cases: 03/35 (need to ensure that Tribunal provides opportunity to applicant to reply to any matter that becomes the subject of an adverse finding); 04/21 (a privacy case dealing with the duty to ensure that the agency discloses precisely its conduct before making findings); 04/26 (duty of Tribunal towards self-represented person to ensure person has awareness of possible adverse finding, here on causation in respect of order for monetary compensation in a privacy case).

# Supreme Court

Appeal Panel decisions, and some Divisional decisions, may be appealed on a question of law to the Supreme Court under s 119 of the ADT Act or under the statute conferring jurisdiction. An Appeal Panel may also refer a question of law to the Supreme Court for its opinion under s 118 of the ADT Act. Alternatively, and less commonly, an originating summons can be taken out by a party, effectively seeking to remove the matter from the Tribunal and have it dealt with by the Supreme Court instead of the Appeal Panel.

1. Appeal: *Director-General, Department of Community Services v. Druett* [2003] NSWCA 351: The Appeal Panel had refused to award costs against Mr Druett after his FOI appeal was unsuccessful, as the appeal had not placed a "substantial burden" on the agency. In the Court of Appeal, the agency argued that the appeal's manifest lack of foundation constituted "special circumstances" justifying an award of costs under the ADT Act. The Court held that the Appeal Panel had taken into account the "special circumstances" that the appeal had no foundation and dismissed the appeal.
2. Summons: The main issue in *The Ombudsman v Koopman* [2003] NSWCA 277 was whether the Ombudsman could be the subject of a privacy application for review of conduct in the Tribunal, given the immunity from suit provision in the *Ombudsman Act*. The Tribunal ruled that the immunity provisions in the *Ombudsman Act* did not apply because the *Privacy and Personal Information Protection Act* was a comprehensive code which applied fully to public sector agencies, subject only to express qualifications contained in the Act. The Court of Appeal disagreed, applying the principle that a construction of a later Act (the *Privacy Act*) which

saves a provision of an earlier Act (the *Ombudsman Act*) from implied repeal is to be strongly preferred. It held that the two Acts were not inconsistent. The result is that privacy proceedings can not be brought against the Ombudsman and his officers unless the Supreme Court is satisfied that the Ombudsman or officer has acted in bad faith.

3. Referral: In *Commissioner of Police New South Wales v "N"* [2003] NSWSC 943, the Supreme Court considered the referred question whether documents concerned with the Police's law enforcement functions were documents relating to the Police's "administrative functions" for the purposes of the *Freedom of Information Act 1989*, and upheld the Tribunal's finding that they were.
4. Appeal: *Tu v University of Sydney* [2003] NSWCA 170: A member became unavailable on the hearing day and the Acting President replaced her with another member. The applicant did not give the consent required by s 79 of the ADT Act to the replacement. The Tribunal proceeded regardless and dismissed the complaint. The Appeal Panel held that the proceedings were valid, as the Acting President's decision as to reconstitution was not an "appealable decision." The Court of Appeal held, reversing the Appeal Panel, that the applicant's non-consent to reconstitution by replacement for the purposes of s 79(1) rendered the Tribunal without jurisdiction. It was necessary in these circumstances for the Acting President to decide to create a new Tribunal in accordance with s 79(3) and s 22. As this had not occurred, the complaint remained to be determined and was remitted to the Tribunal.
5. Referral: In *Director General, Department of Community Services v MM*

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*and Anor* (2003) NSWSC 1241, the Supreme Court held that an agency which offered people the opportunity to become foster parents was providing a "service" within the meaning of the *Anti-Discrimination Act 1977*. So the applicant could bring proceedings against the agency alleging that he had been discriminated against on the ground of disability in respect of becoming a foster carer.

6. Appeal: *Gardiner v Chief Commissioner of State Revenue* [2004] NSWSC 107 concerned the issue of the circumstances in which an instrument of transfer fails in its intended operation for the purposes of the *Duties Act 1997*. Ms Gardiner had paid substantial stamp duty on an unregistered transfer of property from her father. After he died and before the transfer had been registered, she inherited this property under her father's will. The Appeal Panel held that she was not entitled to a reassessment of the stamp duty she had paid, as the instrument of transfer had not failed in its intended operation of protecting her interests until her father's will came into effect. Reversing this decision, the Supreme Court held that the instrument was intended to effect a transfer of the legal title to the land if registered, and that it had failed in its intended operation and become useless. Accordingly, Ms Gardiner was entitled to a reassessment of stamp duty.
7. Appeal: In *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32, the Court of Appeal considered whether the Tribunal had denied a lawyer procedural fairness in having regard to his giving of false evidence when deciding to make an order removing him from the roll of practitioners. Dismissing an appeal from

the Appeal Panel's decision upholding the Tribunal's decision, the Court held that a finding that a party had lied to the Court in proceedings of professional misconduct could be taken into account without the formal amendment of charges to make that an additional charge of misconduct. As the time for determining fitness to practise was the time of hearing, the practitioner's conduct and state of mind up to that time were relevant. While there were some errors of law in the Appeal Panel's decision, the Court did not consider them sufficient to warrant interfering with the order for striking off. The Court emphasized the "sacrosanct nature of trust accounts" and the gravity of any offence involving trust monies.

8. Appeal: In *Golden Harvest (Aust) P/L v Paing* [2004] NSWCA 85, prior to entry into leases, a lessor informed lessees about a proposal to build a residential tower on top of a shopping centre. When they learnt that the tower was not going to be built, the lessees sought compensation under the *Retail Leases Act*. The Appeal Panel reversed the Tribunal's decision awarding the lessees compensation, holding that there was no evidence that the lessor had knowingly made a false or misleading representation about the building of the residential tower. A single Judge of the Supreme Court then set aside the Appeal Panel's decision on the basis that no question of law was involved, and it had wrongly substituted its own view on a question of fact. The Court of Appeal restored the Appeal Panel's decision, agreeing with the Appeal Panel that the Tribunal's decision involved a material error of law in that there was no evidence to justify the Tribunal's finding that the representation was misleading.

# Services to our Users and Community Relationships

In accordance with the Tribunal's objectives, the Tribunal is committed to ensuring that it is accessible, that its decisions are transparent and fair and that proceedings are determined informally and expeditiously.

Transparency is achieved through open hearings, except where special orders are made to close them. It is also achieved through the publication of all reserved decisions on the Tribunal website.

The Tribunal seeks to make itself accessible through the use of telephone and video links to parties who find it difficult to attend hearings in person, and through Members sitting in local courts in regional New South Wales where appropriate. The Tribunal's hearing rooms and registry are at a central city location.

The President has recently established a Professional Discipline Advisory Group to enable consultation with professional and community representatives on professional disciplinary matters. This is discussed under "Practice and Procedure."

## **Tribunal website**

The Tribunal's website is located at [www.lawlink.nsw.gov.au/adt](http://www.lawlink.nsw.gov.au/adt). It is the primary source of information about the Tribunal.

The site provides information about the ADT legislation and rules, including the daily list and all published decisions. It also provides information about each Division. The website includes access to all Practice Notes, standard forms and brochures. Practitioners may also subscribe by email to the daily Tribunal hearing list.

## **Website Usage 2003-2004**

July	Aug	Sept	Oct	Nov	Dec
71,500	91,537	127,494	108,845	114,786	67,379
Jan	Feb	Mar	Apr	May	June
68,216	93,065	82,036	55,914	71,845	66,188

The average number of pages viewed per month during the year was 84,900. This compares with the Supreme Court's average of about 140,000 hits per month. The high usage of the Tribunal website indicates that it is an effective means of communicating information about the Tribunal to its users.

## **Published Decisions**

Since its establishment the Tribunal has sought to ensure that reasons in all reserved decisions and in selected ex tempore decisions are published through the CaseLaw NSW web-site and related services such as the Australasian Legal Information Institute site (AUSTLII). This practice is of special importance to the development of principle in the many emerging areas of the law with which the Tribunal deals. The Tribunal is the principal or exclusive jurisdiction in New South Wales in several subject areas including Freedom of Information, Privacy and Equal Opportunity.

In the last year there were 329 reported decisions, compared to 393 in the previous year. This year all Divisions published fewer decisions. On the other hand the Appeal Panel published 74 decisions as compared to 43 last year.

The breakdown of published decisions for this year is: Appeal Panel, 74 (66 internal appeals, 8 external appeals); General Division, 121; Revenue Division, 26; Community Services Division, 11; Equal Opportunity Division, 34; Retail Leases Division, 37; Legal Services Division, 26. Total, 329.

# Membership

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During the year the Tribunal's membership comprised 68 presidential or judicial members and 80 non-judicial members. The list with appointment details appears in Appendix A.

The distribution of men and women is evenly spread. Of the judicial members, 36 are male and 32 are female. Of the non-judicial members there are 38 men and 42 women.

## Changes in Membership

*New Members:* During the year, 8 new judicial members and 18 new non-judicial members joined the Tribunal. Almost all of these appointments were made following a selection process after advertisements in major newspapers.

*Retirements:* 11 members resigned or retired following completion of their term of appointment.

*Appointments to Bench:* Conrad Staff, a long-standing solicitor member of the Legal Services Division, was appointed as a Justice and Deputy President of the Industrial Relations Commission of New South Wales in 2003. Matthew Smith, a judicial member until 2001, was appointed as a Federal Magistrate. Deputy Presidents Chesterman and Nader were reappointed as Acting Judges of the District Court of New South Wales.

## Members' Professional Development Day

The Fifth Annual Members' Professional Development Day was held on 5 September 2003 at the Australian Museum. The Professional Development Day gives members a chance to come together in one place to exchange ideas and to update professional skills.

The theme for the day was "Tribunals in Practice." The day began with a welcome by the Chief Justice of the New South Wales Supreme Court, the Hon James Spigelman AC.

Topics addressed included:

*The Way Tribunals Operate* – Professor Robin Creyke, Australian National University;

*The Multi-Disciplinary Model in Tribunals* – Christine Heazlewood, Consultant, Victorian Institute of Teaching and Pamela O'Neil, Senior Member, Administrative Appeals Tribunal of the ACT;

*The Law Affecting Tribunals: Recent Developments* – Denis O'Brien, Partner, Minter Ellison; and

*Privacy: Implications for Public Sector Agencies in NSW* – Anna Johnston, Deputy Privacy Commissioner, NSW.



*Chief Justice Spigelman with Tribunal President, Judge O' Connor, Professional Development Day, 5 September 2003*

The day also included break-out sessions with Deputy President Michael Chesterman addressing the Retail Leases Division; Magistrate Kenneth Raphael of the Federal Magistrates Court addressing the Equal Opportunity Division; Professor Terry Carney of the University of Sydney addressing members of the Guardianship and Protected Estates List; Pamela O'Neil, Senior Member, Administrative Appeals Tribunal of the ACT, addressing the lay members; and Pamela Morgan of Macquarie University addressing the Legal Services Division and Veterinary Disciplinary Panel members.

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### **Council of Australasian Tribunals**

The Council of Australasian Tribunals (COAT) has recently been established to create a national network of tribunals. This will provide training for tribunal members and enable them to consult with each other and discuss areas of common interest. The New South Wales Committee of COAT, of which the President of this Tribunal, Judge Kevin O'Connor, is a member, adopted the Constitution of the NSW Chapter of COAT in September 2003.



*Chief Justice Spigelman opening the Professional Development Day, 5 September 2003.*

members of Commonwealth and State tribunals.

The theme of the conference was the special role of tribunals. The Hon Deirdre O'Connor, retired Federal Court judge and former head of a number of Federal jurisdictions including the Administrative Appeals Tribunal, spoke informatively about the differences between courts and tribunals. In a session chaired by Judge Kevin O'Connor, Di Robinson, the Deputy President of the Mental Health Review Tribunal, discussed the use and role of expert witnesses in tribunals. The final item in the program was a panel session chaired by Magistrate Nancy Hennessy, Deputy President of the Administrative Decisions Tribunal, concerned with self-represented parties in tribunals. The members of the panel were Brian Knox SC, Barrister, the Hon Justice Alwynne Rowlands of the Family Court, and Kay Ransome, Chairperson of the Consumer Trader and Tenancy Tribunal.

The inaugural conference of the NSW Chapter of COAT was held on 28 May 2004 and attended by many members of the Administrative Decisions Tribunal. The Convenor of COAT NSW, Nick O'Neill, reported on progress in the formation of the NSW Chapter. The National President of COAT, the Hon Justice Garry Downes AM, spoke about the National Council's progress, work, and objectives. The conference was attended by over 100 New South Wales

# Practice and Procedure

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The practice of the Tribunal is formally documented in its Practice Notes and Rules. The general approach that the Tribunal has adopted has been to set out its practice on matters in its Practice Notes, wherever possible, rather than formally-made Rules. This approach enables the Tribunal to take a flexible approach to dealing with practice issues, and making to amendments quickly if needed. The Rules of the Tribunal are found in the *Administrative Decisions Tribunal (Interim) Rules 1998* contained in the *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998*.

## Practice Notes

The Tribunal has issued four further Practice Notes this year. These are:

- PN 13 All Divisions: Publication, Anonymisation and Suppression
- PN 14 All Divisions: Expert Evidence and Reports
- PN 15 All Divisions: Incapacitated Persons: Appointing a Representative
- PN 16 General, Equal Opportunity and Community Services Divisions: Mediation.

## Alternative Dispute Resolution

Mediation is one form of Alternative Dispute Resolution provided for by the ADT Act. The other form, neutral evaluation, is not currently in use. Mediation is available in appropriate Equal Opportunity, Community Services, Freedom of Information and Privacy matters. The objective of referring a matter to mediation is to provide a quick and effective mechanism for resolving or partly resolving applications that are before the Tribunal.

This year the Tribunal has developed and refined its policies and practices. With the help of an independent report from the Australian Commercial Disputes Centre, the Tribunal has modified its procedures and set

out the fundamentals of the mediation process in Practice Note 16. The Tribunal has also developed a new Agreement to Mediate, which must be signed by each party prior to participating in a mediation, and a questionnaire to obtain feedback from participants in the mediation process.

The Tribunal provides trained mediators, who are also qualified Tribunal members, at no cost to the parties. Of course, the mediator takes no part in the hearing of the matter if mediation is unsuccessful.

## The Rule Committee

The Rule Committee has continued to endorse the preferred approach of the Tribunal to matters of practice and procedure – use of Practice Notes and standard letters. This allows the Tribunal to deal flexibly with any need to revise practice. These less formal instruments are tabled at Rule Committee meetings for comment.

The President established a Professional Discipline Advisory Group during the year. The Tribunal has power to discipline members of certain professional groups and to review certain decisions of professional bodies in relation to their members. The professions over which the Tribunal has jurisdiction are lawyers, registered surveyors, accredited certifiers, architects and veterinary surgeons. The Group has been asked to make proposals for uniform procedures in all professional discipline matters in the Tribunal and to identify matters which should be addressed by amendment to legislation or rules. Once its report is finalized it will be referred to the Rule Committee.

Rule Subcommittees have been established in respect of the General, Community Services, Equal Opportunity, Retail Leases and Legal Services Divisions. Their membership is set out in Appendix G.

# Registry and Budget

## **Accommodation**

The Registry is located at Level 15, 111 Elizabeth Street Sydney. The design of the Registry counter, the reception area and the hearing rooms seeks to accommodate the needs of Tribunal users with disabilities. There are four hearing rooms and three interview rooms for mediation and conferences.

## **Staff**

The Registry has eleven positions, including the Registrar and Deputy Registrar. The position of Registrar is filled by two staff who job share. Registry staff work in small teams specialising in case management, client services and support services. In order to develop and maintain individual skills, officers are rotated between the teams.

A separate position of Research Associate to the President provides legal and research support for the President and the full-time Deputy President.

The Registry provides the following services: enquiries, registrations, hearing support, case management and general administrative support to members. In addition, registry staff maintain the Tribunal's website, ensuring that information about the Tribunal's jurisdiction and procedures are up-to-date and readily available to the public.

## **Projects**

A client survey was undertaken towards the end of 2003. Over 90% of respondents provided positive feedback, reporting that people with special needs could access our services, useful information was being provided by the registry, and users received excellent service from staff.

Staff in the registry continue to engage in team based projects designed to streamline a number of internal processes and systems and improve service delivery to the

Tribunal's users. The Tribunal's web site is also being redesigned to make it more accessible to the community.

A high number of applicants and some respondents appearing before the Tribunal are unrepresented, except in professional disciplinary matters where both parties are usually represented. The Registry continues to incorporate improvements to services to litigants in person in all its projects.

## **Staff development**

Staff receive training through the Attorney General's Department Corporate Development and Training Unit, and through attendance at relevant conferences. Additionally, staff receive in-house training on new legislation and procedural changes.

All staff participate in a performance plan, which is used as a tool to identify opportunities for individual officers to develop and consolidate the skills they require to effectively deliver services to members and Tribunal users.

## **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 is provided by a budget allocated by the Attorney General's Department and funding is allocated by the trustees of the Public Purpose Fund. The Public Purpose Fund is used primarily to meet the cost of operating the Legal Services Division of the Tribunal. The Public Purpose Fund comprises interest earned on solicitors' clients' funds held in compulsory trust account deposits under the *Legal Profession Act*. Appendix D provides a picture of the expenditure incurred by the Tribunal in the reporting period.

# Appendices

## Appendix A: List of Members

1 July 2003 to 30 June 2004

This list of members of the Tribunal indicates who held appointments during the reporting period, organised by Divisions. In the case of new members appointed during the current reporting period, their date of appointment to this Tribunal is shown next to their names. In the case of continuing members, their first date of appointment is shown in the relevant previous annual report unless they held appointments to former tribunals and were continued under transitional provisions.

If a member has been assigned to more than one Division, there is a corresponding entry. The President is assigned to all Divisions. Where a member resigned during his or her term, there is an asterisk next to the date in the expiry date column, and the date shown is the date of resignation.

### PRESIDENT

Judge KEVIN PATRICK O'CONNOR, AM, to 9 August 2004

Assigned to all Divisions in accordance with s 21(1) of the *Administrative Decisions Tribunal Act 1997*.

### DEPUTY PRESIDENT (Full-time)

Magistrate NANCY LOUISE HENNESSY, to 7 March 2007

Assigned as set out below.

### GENERAL DIVISION

#### Current Expiry date

#### Divisional Head

Judge KEVIN PATRICK O'CONNOR, AM, President 9.8.04

#### Deputy Presidents

Acting Judge MICHAEL RAINSFORD CHESTERMAN 2.10.05

Magistrate NANCY LOUISE HENNESSY 7.3.07

#### Judicial Members

ANNE BRITTON 29.7.05

JENNIFER LOUISE CONLEY 2.6.05

JANICE MARGERY CONNELLY 2.6.05

BRUCE GEORGE DONALD 28.2.05

ROBBERT JOHN FOX 25.11.05

PENELOPE HELEN GOODE 8.10.06

ERAINE ELIZABETH GROTTÉ 2.6.05

SIGRID HIGGINS 30.4.07

MERRYL ANNE LEES 25.11.03

PETER HENRY MOLONY 28.2.05

STEPHEN HENRY MONTGOMERY 30.4.07

JANE ANNABEL DARLING NEEDHAM 2.6.05

NEIL ROBERT REES (Acting Deputy President

from 9.10.03 to 8.4.04, then from 15.4.04) 8.10.06

SIMON JAMES RICE, OAM 25.11.05

MARK ANTHONY ROBINSON 28.2.05

CHRISTOPHER DOMINIC SIDOTI 1.9.03\*

#### Non-judicial Members

ZITA ROSE ANTONIOS 25.11.05

CLIFFORD DOUGLAS BLAKE, AM 30.6.04

MARY ELIZABETH BOLT 30.4.07

KEVEN WILLIAM MAPPERSON 28.2.05

MICHAEL JOHN McDANIEL 25.11.05

ANNETTE FRANCES O'NEILL 23.2.06

ANTHONY PUN, OAM 19.4.04

#### Presidential Members assigned to Guardianship and Protected Estates list

Magistrate NANCY LOUISE HENNESSY 7.3.07

#### Judicial Members assigned to Guardianship and Protected Estates list

ANNE BRITTON 29.7.05

GRAEME GORDON INNES, AM 25.11.05

SUZANNE MAREE LEAL (9.10.03) 8.10.06

JULIAN JOSEPH MILLAR (9.10.03) 8.10.06

NEIL ROBERT REES (Acting Deputy President

from 9.10.03 to 8.4.04, then from 15.4.04) 8.10.06

#### Non-judicial Members assigned to Guardianship and Protected Estates list

MARY ELIZABETH BOLT 30.4.07

BARBARA RUTH FIELD (17.11.03) 16.11.06

JENNIFER GREEN 23.8.05

LYNN MARY HOULAHAN 23.8.05

BELINDA ANNE MERICOURT (17.11.03) 16.11.06

ELIZABETH ANNE WHAITE (17.11.03) 16.11.06

ANN DOMINICA WUNSCH (17.11.03) 16.11.06

#### Non-judicial Members, Public Health

ANNEMARIE HENNESSY 30.4.07

RICHARD MATTHEWS 30.4.07

# Appendices

## Non-judicial Members, Accredited Certifier

PETER GABRIEL FRIEDMANN (4.8.03)	3.8.06
PHILIP ARTHUR HAYWARD (4.8.03)	3.8.06
GRAHAM JOHN MALLISON (4.8.03)	3.8.06
GORDON PATRICK WREN (4.8.03)	3.8.06

## Non-judicial Members, Veterinary Surgeons Discipline

FIONA JENNIFER CLARK	5.8.05
TIMOTHY ROBERT CRISP	31.12.05
DAVID LACHLAN EVANS	31.12.05
RICHARD ELDRED JANE	31.12.05
ROSALIE JANE MAYO-RAMSAY	5.8.05
GARTH ALEXANDER McGILVRAY	31.12.05
TANYA LORRAINE STEPHENS	31.12.05
RUTH ROSEMARY THOMPSON	31.12.05

## Non-judicial Members, Education

TERENCE RICHARD BURKE, AM	2.6.05
JOLYN MARGARET KARAOOLIS, AM	2.6.05
JOSEPH RIORDAN, AO	28.2.05

## EQUAL OPPORTUNITY DIVISION

### Divisional Head

Magistrate NANCY LOUISE HENNESSY	7.3.07
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### Deputy President

Acting Judge MICHAEL RAINSFORD CHESTERMAN	2.10.05
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### Judicial Members

LARISSA YASMIN BEHRENDT	25.11.05
DAVID LEE BITEL	8.10.06
ANNE BRITTON	29.7.05
JENNIFER LOUISE CONLEY	2.6.05
JANICE MARGERY CONNELLY	2.6.05
PENELOPE HELEN GOODE	8.10.06
PHILLIPA JANE GORMLY	8.10.03
ERAINE ELIZABETH GROTE	2.6.05
GRAEME GORDON INNES, AM	25.11.05
GRAHAM REGINALD IRELAND	25.11.05
RUTH LAYTON (9.10.03)	8.10.06
MERRYL ANNE LEES	25.11.03
CHRISSE TEREASA LOUKAS	8.10.06
JANE ANNABEL DARLING NEEDHAM	2.6.05
NEIL ROBERT REES (Acting Deputy President from 9.10.03 to 8.4.04, then from 15.4.04)	8.10.06
SIMON JAMES RICE, OAM	25.11.05
JANELLE ANNE SAFFIN (17.11.03)	16.11.06
CHRISTOPHER DOMINIC SIDOTI	1.9.03*

### Non-judicial Members

MERILYN ALT	8.10.03
ZITA ROSE ANTONIOS	25.11.05
MARY ELIZABETH BOLT	30.4.07
STEVIE CLAYTON, OAM	25.11.05

RENIA DOUGLAS COX	8.10.06
MAREE JANE GILL (9.10.03)	8.10.06
KAREN GREENHILL	8.10.06
ELAYNE HAYES	30.4.07
NOEL ARTHUR HIFFERNAN (9.10.03)	8.10.06
LYNN MARY HOULAHAN	23.8.05
RICHARD FREDERICK JONES	8.10.03
ANTHEA ELISABETH LOWE (9.10.03)	8.10.06
MICHAEL JOHN McDANIEL	25.11.05
OWEN MICHAEL McDONALD, OAM	8.10.03
LINDA MARILYN MONAGHAN-NAGLE	30.4.07
LAURA CLARE MOONEY	28.9.06
LOUISE NEMETH DE BIKAL	8.10.06
MAURICE MICHAEL O'SULLIVAN (9.10.03)	8.10.06
HENRY NAN HUNG PAN, OAM (9.10.03)	8.10.06
ANTHONY PUN, OAM	19.4.04
CLEONIE DOROTHY QUAYLE	30.4.07
ANTHONY MICHAEL JOSEPH SCHEMBRI (9.10.03)	8.10.06
LUCY TAKSA	25.11.05
DOREEN TOLTZ	8.10.06
BETTY LORRAINE WEULE	30.4.07

## COMMUNITY SERVICES DIVISION

### Divisional Head

THOMAS JOSEPH KELLY, Deputy President	30.4.07
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### Judicial Members

ANNE BRITTON	29.7.05
BEN AMI GELIN	31.5.04
PHILLIPA JANE GORMLY	8.10.03
MARGARET MARY SMYTH (15.6.04)	30.4.07

### Non-judicial Members

MARY ELIZABETH BOLT	30.4.07
DAVID EDWIN DOBELL	30.4.07
JENNIFER GREEN	23.8.05
DENNY GROTH	30.4.07
LYNN MARY HOULAHAN	23.8.05
ALAN JOHN KIRKLAND	31.5.04
MEREDITH MARTIN	23.8.05
JAN MASON	30.4.07
JEANETTE McDONALD MOSS, AM	23.8.05
LINDA MARILYN MONAGHAN-NAGLE	30.4.07
CLARITA NORMAN	30.4.07

## LEGAL SERVICES DIVISION

### Divisional Head

Acting Judge JOHN ANTHONY NADER, RFD, QC, Deputy President	31.8.05
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### Deputy Presidents

Acting Judge MICHAEL RAINSFORD CHESTERMAN	2.10.05
Acting Judge ALAN EUGENE HOGAN	3.1.04

# Appendices

## Barrister Members

ROBERT BRUCE SCOTT MACFARLAN QC	16.12.05
JOHN ANTHONY McCARTHY QC	16.12.05
SHARRON NORTON SC	16.12.05
DAVID PETER FORBES OFFICER QC	16.12.05
LIONEL PHILIP ROBBERDS QC	16.12.05
WENDY LOUISE ROBINSON QC	16.12.05
ALISON PATRICIA STENMARK SC (13.1.04)	12.1.07
JOHN NORMAN WEST QC	16.12.05

## Solicitor Members

MICHAEL JAMES BARNES	30.4.07
JOHN WILLIAM FRANCIS BRENNAN, RFD	16.12.05
ROGER JAMES CLISDELL	16.12.05
ROSEMARY COX	16.12.05
JOHN SYDNEY CURRIE	16.12.05
ANDREA DURBACH	16.12.05
ROBBERT JOHN FOX	25.11.05
CHRISTINE ANNE GAILEY	16.12.05
JULIE LOUISE GREENWOOD	16.12.05
SANDRA NERYL HALE	16.12.05
JENNIFER MARGARET MATTILA	16.12.05
GRAHAM BRIAN MOLLOY	25.11.05
JOHANNA PHEILS	30.4.07
MICHELLE ANNE RIORDAN (25.5.04)	30.4.07
CONRAD GERARD STAFF	10.12.03*
CEDRIC BOHRSMANN VASS	16.12.05

## Licensee Members

PAULINE ELLEN CURRAEY	31.12.04
JANICE LOUISE HEDISON	31.12.04

## Non-judicial Members

CARL DONALD BENNETT	30.4.07
LESHIA OLGA BUBNIUK	30.4.07
MICHAEL EUGENE COSTIGAN	23.2.06
BARRIE DRUMMOND DYSTER	23.2.06
KERSTI ELLIOTT	23.2.06
ROSS ANDREW EDWARD FITZGERALD	23.2.06
JENNIFER ANNE GEDDES	23.2.06
RAY GIETZELT, AO	30.4.07
ELAYNE HAYES	30.4.07
DAVIES HOAREAU	23.2.06
ALAN KENNEDY	23.2.06
ELISABETH WILMA KIRKBY	30.4.07
DEBORAH KLIKA	30.4.07
DENIS MAHON	23.2.06
ANN MARIE MARA	23.2.06
ANNETTE FRANCES O'NEILL	23.2.06
CLEONIE DOROTHY QUAYLE	30.4.07
LUCY TAKSA	25.11.05

## RETAIL LEASES DIVISION

### Divisional Head

Acting Judge MICHAEL RAINSFORD	
CHESTERMAN, Deputy President	2.10.05

### Deputy Presidents

Magistrate NANCY LOUISE HENNESSY	7.3.07
Actng Judge ALAN EUGENE HOGAN	3.1.04
Acting Judge JOHN ANTHONY NADER, RFD QC	31.8.05
CHRISTOPHER JOHN ROSSITER	5.12.04

### Judicial Members

PHILIP LESLIE BOYCE (17.11.03)	16.11.06
BRUCE GEORGE DONALD	28.2.05
ROBBERT JOHN FOX	25.11.05
SIGRID HIGGINS	30.4.07
MARGARET COLLEEN HOLE, AM	30.4.07
GRAHAM BRIAN MOLLOY	25.11.05
STEPHEN HENRY MONTGOMERY	30.4.07
KIM BERESFORD RICKARDS (17.11.03)	16.11.06
JANELLE ANNE SAFFIN (17.11.03)	16.11.06

### Non-judicial Members

NEIL FAGG	5.12.04
ROGER KENNETH FAIRWEATHER	5.12.04
GARTH WARREN GRIFFITHS	5.12.04
BRIAN TERRY HARRISON (19.8.03)	18.8.06
ANNETTE FRANCES O'NEILL	23.2.06
BARRY THOMAS OWENS	5.12.04
TERENCE JAMES TYLER (19.8.03)	18.8.06
ROBERT VAUGHAN WARD	5.12.04
BETTY LORRAINE WEULE	30.4.07
LEXIA GAI WILSON	5.12.04

## REVENUE DIVISION

### Divisional Head

Divisional Head yet to be appointed

### Judicial Members

JULIAN BLOCK	30.6.04
MARGARET COLLEEN HOLE, AM	30.4.07
JOANNE CHRISTINE SEVE	30.6.04
AMARJIT SINGH VERICK	30.6.04

### Non-judicial Members

CARL DONALD BENNETT	30.4.07
CLIFFORD DOUGLAS BLAKE, AM	30.6.04

\* Date of resignation

# Appendices

## Appendix B: Legislation

### Principal Legislation

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

### Primary Legislation

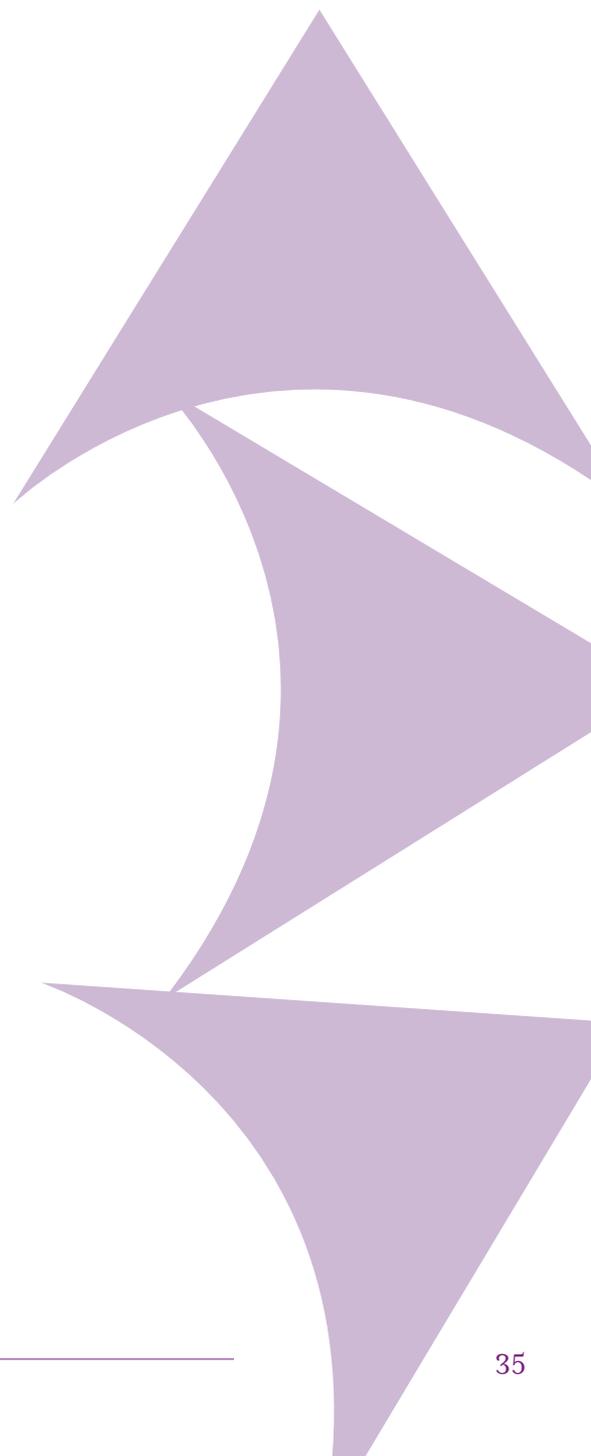
Note: This list of legislation contains conferrals of jurisdiction, as at 30 June 2004, as advised to Registry.

Adoption Act 2000  
Agricultural Livestock (Disease Control Funding)  
Act 1998  
Animal Research Act 1985  
Anti-Discrimination Act 1977  
Apiaries Act 1985  
Architects Act 1921  
Architects Act 2003  
Births Deaths and Marriages Registration Act 1995  
Boxing and Wrestling Control Act 1986  
Charitable Fundraising Act 1991  
Child Protection (Offenders Registration) Act 2000  
Child Protection (Prohibited Employment) Act 1998  
Children (Care and Protection) Act 1987  
Children and Young Persons (Care and Protection)  
Act 1998  
Community Justices Centres Act 1983  
Community Services (Complaints, Appeals and  
Monitoring) Act 1993  
Community Services (Complaints, Appeals and  
Monitoring) Regulation 1996  
Conveyancers Licensing Act 1995  
Co-operative Housing and Starr-Bowkett Societies  
Act 1998  
Dangerous Goods Act 1975  
Disability Services Act 1993  
Education Act 1990  
Electricity Supply Act 1995  
Entertainment Industry Act 1989  
Environmental Planning and Assessment Act 1979

Factories, Shops and Industries Act 1962  
Fair Trading Act 1987  
Farm Debt Mediation Act 1994  
Fertilisers Act 1985  
Firearms Act 1996  
Firearms (General) Regulation 1997  
First Home Owner Grant Act 2000  
Fisheries Management Act 1994  
Food Act 2003  
Food Production (Dairy Food Safety Scheme)  
Regulation 1999  
Food Production (Meat Food Safety Scheme)  
Regulation 2000  
Food Production (Seafood Safety Scheme)  
Regulation 2001  
Forestry Act 1916  
Freedom of Information Act 1989  
Game and Feral Animal Control Act 2002  
Gas Supply Act 1996  
Guardianship Act 1987  
Home Building Act 1989  
Hunter Water Act 1991  
Impounding Act 1993  
Legal Profession Act 1987  
Legal Profession Regulation 1994  
Licensing and Registration (Uniform Procedures)  
Act 2002  
Local Government Act 1993  
Motor Dealers Act 1974  
Motor Vehicle Repairs Act 1980  
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  
Optometrists Act 2002  
Passenger Transport Act 1990  
Pawnbrokers and Second-hand Dealers Act 1996  
Pesticides Act 1999  
Petroleum Product Subsidy Act 1997  
Plant Diseases Act 1924

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Police Act 1990  
Powers of Attorney Act 2003  
Privacy and Personal Information Protection Act  
1998  
Private Hospitals and Day Procedure Centres Act  
1988  
Property, Stock and Business Agents Act 2002  
Protected Estates Act 1983  
Protected Estates Regulation 1995  
Public Health Act 1991  
Public Lotteries Act 1996  
Rail Safety Act 2002  
Registration of Interests in Goods Act 1986  
Retail Leases Act 1994  
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  
Stock (Artificial Breeding) Act 1985  
Surveying Act 2002  
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  
Veterinary Surgeons Regulation 1995  
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



# Appendices

## Appendix C: List of Speeches

### Judge Kevin O'Connor, President

#### Papers

28 February 2004

"Administrative Decisions Tribunal of NSW"  
NSW Young Lawyers – Annual Litigation One Day Seminar.

3 March 2004

"Administrative Law in Practice"  
Indonesian Judicial Training Program  
Judicial Commission of New South Wales, Sydney.

### Magistrate Nancy Hennessy, Deputy President

#### Papers

24 September 2003

"Privacy applications before the Administrative Decisions Tribunal"  
Administrative Law Seminar organised by the Crown Solicitor's Office.

## Appendix D: Financial Information

### Financial Information as at 30 June 2004<sup>1</sup>

#### Administrative Decisions Tribunal & Legal Services Division

	ADT			LSD <sup>3</sup>	TOTAL
	Actual	Budget	Variance	Actual	Actual
	\$	\$	\$	\$	\$
Employee Related Payments (Including Crown Liabilities)	1,790,969	1,613,855	(177,114)	9,394	1,800,363
Property Items	386,366	399,542	13,176		386,366
Other Operating	1,423,231	1,357,319	(65,912)	207,535	1,630,766
Depreciation	69,447	66,362	(3,085)		69,447
<b>Total Expenditure</b>	<b>3,670,013</b>	<b>3,437,078</b>	<b>(232,935)</b>	<b>216,929</b>	<b>3,886,942</b>
<b>Total Revenue<sup>2</sup></b>	<b>(713,694)</b>	<b>(657,887)</b>	<b>55,807</b>	<b>(216,929)</b>	<b>(930,623)</b>
<b>Net Cost Of Services</b>	<b>2,956,319</b>	<b>2,779,191</b>	<b>(177,128)</b>	<b>0</b>	<b>2,956,319</b>
Less Depreciation	(69,447)	(66,362)	3,085	0	(69,447)
Less Crown Liabilities	(477,045)	(287,373)	189,672	0	(477,045)
<b>Controlled Net Cost Of Services</b>	<b>2,409,827</b>	<b>2,425,456</b>	<b>15,629</b>	<b>0</b>	<b>2,409,827</b>

#### Notes

1. This appendix has been based on information supplied by the Attorney General's Department. The Audit Office had not completed the audit of the Department's financial statements when this information was supplied.

2. Revenue

The Tribunal received \$930,623.80 in revenue. Of this \$874,595.38 was by way of recoupment from the Public Purpose Fund for the cost of operating the Legal Services Division. The balance was general revenue items.

3. Legal Services Division

The Legal Services Division is funded by the Public Purpose Fund. A global amount is contributed towards the operating costs of the Tribunal and is included in the "actual" and "budget" columns of the ADT.

Additionally the costs of members' fees and associated costs and transcription services provided to that Division are separately recouped. These are the amounts shown in the LSD column.

# Appendix E: Statistics

## General Division 1/7/2003 - 30/6/2004

### 1. Case flow 2003-2004

Matters pending at 30 June 2003	New Applications filed	Disposals	Pending as at 30 June 2004
144*	397	343	198

\*Pending figure of 141 as reported in previous annual report adjusted following manual reconciliation of files and/or changes to data recording.

### 2. Applications by type 2003-2004

Applications for Original Decision	Applications for review	Professional Discipline
15	380	2

### 3. Applications by Act 2003-2004

Subject by Act	
Conveyancers Licensing Act	2
Dangerous Goods Act	1
Education Act	1
Environmental Planning & Assessment Act	1
Fair Trading Act	2
Farm Debt Mediation Act	4
Firearms Act	61
First Home Owner Grant Act	31
Fisheries Management Act	10
Freedom of Information Act	64
Guardianship Act	6
Home Building Act	12
Impounding Act	1
Local Government Act (Original Decision)	11
Motor Dealers Act	4
Motor Vehicle Repairs Act	1
Occupational Health and Safety Act	8
Passenger Transport Act	49
Pawnbrokers & Second Hand Dealers Act	3
Privacy & Personal Information Protection Act	27
Property Stock and Business Agents Act	19
Protected Estates Act	12
Public Health Act	4
Road Transport (General) Act (s.48)	31
Security Industry Act	23
Tow Truck Industry Act	6
Veterinary Surgeons Act	1
Vocational Education & Training Accreditation Act	1
Question of Jurisdiction	1

### 4. Outcomes in Review matters 2003-2004

Application withdrawn Dismissed/No appearance Dismissed/Agreement reached Dismissed	Decision under review affirmed	Decision under review set aside/ varied/remitted/ recommendation made	Mixed Result - Partly Affirmed/ Partly set aside varied or remitted	No Jurisdiction
156	112	47	13	10

\* For statistical purposes the outcome of the review of conduct under the Privacy and Personal Information Protection Act 1998 has been counted as affirmed

# Appendices

## 5. Outcomes in Original matters 2003-2004

Application withdrawn dismissed/ No appearance dismissed/ Agreement reached dismissed	Application granted	Application refused	No Jurisdiction
0	4	0	1

## 6. Outcomes in Professional Discipline 2003 -2004

Dismissed	Orders made	No Jurisdiction
0	0	0

## 7. Timeliness - time from date of application to date of disposal

No. disposed of in under 6 months	252
No. disposed of in under 12 months	71
No. disposed of in over 12 months	15
No. disposed of in over 2 years	5

## Guardianship and Protected Estates List 1/7/2003 - 30/6/2004

**Note:** This information also forms part of the General Division statistics. The List has two components of activity, External Appeals, and General Division Reviews. The External Appeals statistics are provided on p43. As to the General Division Reviews, more detailed statistics than those that appear in the General Division table follow.

### 1. Case Flow-Guardianship and Protected Estates Review Matters 2003-2004

Pending as at 30 June 2003	New Applications Filed	Disposals	Pending as at 30 June 2004
1	18	9	10

### 2. Applications for review by Act 2003-2004

Subject by Act	Number
Guardianship Act	6
Protected Estates Act	12

### 3. Outcomes in Review Matters under the Guardianship Act and the Protected Estates Act 2003-2004

Application Withdrawn Dismissed/No appearance Dismissed/ Agreement reached Dismissed	Decision under review	No Jurisdiction	Total
3	5	1	9

### 4. Timeliness - time from date of application to date of disposal

No. disposed of in under 6 months	8
No. disposed of in under 12 months	1
No. disposed of in over 12 months	0
No. disposed of in over 2 years	0

## Community Services Division 1/7/2003 - 30/6/2004

### 1. Case flow 2003-2004

Matters pending at 30 June 2003	New Applications filed	Disposals	Pending as at 30 June 2004
12	43	41	14

### 2. Applications by type 2003-2004

Applications for original decision	Applications for review
24	19

### 3. Applications by Act 2003-2004

Subject by Act	Number
Children and Young Persons (Care and Protection) Act	9
Children (Care and Protection) Act	10
Declaration that Child Protection (Prohibited Employment) Act 1998 does not apply	24

### 4. Outcomes - Reviewable Decisions 2003-2004

Application withdrawn Dismissed/No appearance Dismissed/Agreement reached Dismissed	Decision under review affirmed	Decision under review set aside/ varied/remitted/ recommendation made	Mixed Result - Partly Affirmed/ Partly set aside varied or remitted	No Jurisdiction/ Jurisdiction Declined
9	3	0	0	3

### 5. Outcomes- Original Decisions 2003-2004

Application withdrawn dismissed/ No appearance dismissed/ Agreement reached dismissed	Declaration made	Declaration Refused	No Jurisdiction
7	13	4	2

### 6. Mediation 2003-2004

No. of disposals where mediation was conducted	Settled at Mediation	Settled after Mediation	Proceeded to Hearing
2	2	0	0

### 7. Timeliness - time from date of application to date of disposal

No. disposed of in under 6 months	32
No. disposed of in under 12 months	8
No. disposed of in over 12 months	1
No. disposed of in over > 2 years	0

## Revenue Division 1/7/2003 - 30/6/2004

### 1. Case flow 2003-2004

Matters pending at 30 June 2003	Applications filed	Disposals	Matters pending as at 30 June 2004
34	56	56	34

### 2. Applications by Type 2003-2004

Subject by Act	
Duties Act 1997	6
Land Tax Management Act 1956	21
Parking Space Levy Act 1992	1
Payroll Tax Act 1971	16
Stamp Duties Act 1920	1
Taxation Administration Act 1996	10
First Home Owner Grant Act 2000	1

# Appendices

## 3. Outcomes 2003 - 2004

Application withdrawn Dismissed/No appearance Dismissed/Agreement reached Dismissed	Decision under review affirmed	Decision under review set aside/ varied/remitted/ recommendation made	Mixed Result - Partly Affirmed/ Partly set aside varied or remitted	No Jurisdiction
30	18	7	1	0

## 4. Timeliness - time from date of application to date of disposal

No. disposed of in under 6 months	28
No. disposed of in under 12 months	22
No. disposed of in over 12 months	6
No. disposed of in over 2 years	0

## Legal Services Division 1/7/2003 - 30/6/2004

### 1. Case flow 2003-2004

Matters pending at 30 June 2003	Applications filed	Disposals	Pending as at 30 June 2004
23	49	30	42

### 2. Applications by type 2003-2004

Applications for original decision	49
------------------------------------	----

### 3. Applications by subject 2003-2004

Type of Practitioner	Type of conduct**	Number
Solicitor	PM	34
Solicitor	PM & UPC	1
Barrister	PM	5
Barrister	UPC	3
Barrister	PM & UPC	2
Conveyancer	PM	1
S.48I & 48K Applications		3

\*\*PM - professional misconduct, UPC - Unsatisfactory professional conduct

### 4. Outcomes 2003-2004

Withdrawn Dismissed	1
No Jurisdiction	1
Dismissed after hearing	3
Penalty imposed by type	
Removed from Roll	6
Reprimanded and Fined	1
Reprimanded and Compensation ordered	1
Reprimanded	10
Restricted practising certificate and suspended from practice	1
Restricted practising certificate	1
Late application to Tribunal refused	1
S.48I	2
S.48J	1
S.48K	1
Total	30

## 5. Timeliness - time from date of application to date of disposal

No. disposed of in under 6 months	9
No. disposed of in under 12 months	8
No. disposed of in over 12 months	8
No. disposed of in over 2 years	5

## Equal Opportunity Division 1/7/2003 - 30/6/2004

### 1. Case flow 2003-2004

Matters pending at 30 June 2003	New Applications filed	Disposals	Pending as at 30 June 2004
105	201	156	150

### 2. Applications by Type 2003-2004

Applications for original decision	Applications for review
201	0

### 3. Applications by Ground 2003-2004

Head of discrimination**	Number
Race	50
Racial vilification	2
Sexual harassment	35
Sex	37
Transgender	5
Transgender vilification	1
Marital status	8
Disability	61
Carer's responsibilities	11
Homosexuality	11
Homosexual vilification	3
Age	21
Victimisation	51
Aiding and Abetting	4
Vicarious liability	1

\*\*NB: a number of complaints have been referred to the Tribunal under more than one head of discrimination

### 4. Outcomes Original Decisions 2003-2004

Withdrawn Dismissed/ Settled Dismissed/ No Appearance Dismissed	Summary dismissal under section 111	Dismissed after hearing	Orders made
107	7	33	9

### 5. Outcomes - Reviewable Decisions 2003-2004

Application withdrawn Dismissed/No appearance Dismissed/Agreement reached Dismissed	Decision under review affirmed	Decision under review set aside/ varied/remitted/ recommendation made	Mixed Result - Partly Affirmed/ Partly set aside varied or remitted	No Jurisdiction/ Jurisdiction Declined
0	0	0	0	0

### 6. Mediation

No. of disposals where mediation was conducted	Settled at Mediation	Settled after Mediation	Proceeded to Hearing
76	46	17	13

# Appendices

## 7. Timeliness - time from date of application to date of disposal

No. disposed of in under 6 months	88
No. disposed of in under 12 months	42
No. disposed of in over 12 months	20
No. disposed of in over 2 years	6

## Retail Leases Division 1/7/2003 - 30/6/2004

### 1. Case flow 2003-2004

Matters pending at 30 June 2003	Applications filed	Disposals	Pending as at 30 June 2004
67	162	165	64

### 2. Applications by Type 2003-2004

Relevant provision of Retail Leases Act 1994

Section 71	127
Section 71A - unconscionable conduct	2
Combined section 71 and section 71A	33

### 3. Outcomes 2003-2004

Withdrawn/Discontinued/ Dismissed without hearing	Dismissed after hearing	Settled - Orders made	Orders made	No Jurisdiction
119	19	3	22	2

### 4. Timeliness - time from date of application to date of disposal

No. disposed of in under 6 months	125
No. disposed of in under 12 months	21
No. disposed of in over 12 months	16
No. disposed of in over 2 years	3

## Internal Appeals to Appeal Panel

### 1. Case Flow 2003 -2004

	Appeals Pending as 30 June 2003	New Appeals filed	Disposals	Pending as at 30 June 04
General Division	22	41	51	11
Community Services Division	1	0	1	0
Equal Opportunity Division	9	7	15	2
Retail Leases Division	7	6	9	4
Revenue Division	4	5	7	2
Legal Services Division	3	6	6	3
Total	46	65	89	22

## 2. Outcome of Internal Appeals 2003 - 2004

	Upheld (in full or part)	Dismissed	Withdrawn/ Discontinued	No Jurisdiction	Consent Orders	Total
General Division	24	22	4	0	1	51
Community Services Division	0	1	0	0	0	1
Equal Opportunity Division	4	10	1	0	0	15
Retail Leases Division	3	2	3	0	1	9
Revenue Division	3	3	1	0	0	7
Legal Services Division	1	3	2	0	0	6
Total	35	41	11	0	2	89

## 3. Timeliness - time from date of appeal to date of determination

No. disposed of in under 6 months	63
No. disposed of in under 12 months	20
No. disposed of in over 12 months	5
No. disposed of in over 2 years	1

## External Appeals to the Appeal Panel

### 1. Case Flow 2002 -2003

	Appeals Pending as 30 June 2003	New Appeals filed	Disposals	Pending as at 30 June 04
Guardianship Tribunal	1	28	21	8
Mental Health Review Tribunal	0	0	0	0
Magistrate	0	0	0	0
Total	1	28	21	8

### 2. Outcome of External Appeals 2003 - 2004

	Upheld (in full or in part)	Dismissed	Withdrawn/Discontinued	Total
	4	10	7	21

### 3. Timeliness - time from date of application to date of disposal

No. disposed of in under 6 months	21
No. disposed of in under 12 months	0
No. disposed of in over 12 months	0
No. disposed of in over 2 years	0

# Appendices

## Appeals to the Supreme Court

### 1. Case Flow 2003 - 2004

	Appeals Pending as 30 June 2003	New Appeals filed	Disposals	Pending as at 30 June 04
General Division	1	5	3	3
Community Services Division	0	1	1	0
Equal Opportunity Division	3	2	2	3
Retail Leases Division	0	3	2	1
Revenue Division	0	1	1	0
Legal Services Division	1	2	1	2
Total	5	14	10	9

### 2. Outcome of Appeals 2003 - 2004

	Upheld (in full or part)	Dismissed	Withdrawn/ Discontinued	Orders made following s118 referral
General Division	1	0	1	1
Community Services Division	0	1	0	0
Equal Opportunity Division	1	0	0	1
Retail Leases Division	2	0	0	0
Revenue Division	1	0	0	0
Legal Services Division	0	1	0	0
Total	5	2	1	2

## Appendix F: Case Load, Time Standards

### Case Load

	All Divisions			Appeal Panel		
	Applications Lodged	Applications Completed	Applications Pending	Appeals Lodge	Appeals Completed	Appeals Pending
1998-1999	625*	234	394*	8	2	6
1999-2000	568	619	343*	44	20	31*
2000-2001	666	629	380	53	45	39
2001-2002	695	642	433*	61	59	41
2002-2003	766	817	382	73	67	47
2003-2004	908	791	502	93	110	30
Total	4228	3732		332	303	

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

### Time Standards

As at 30 June 2004 the Tribunal's performance against its time standards was:

(target appears in brackets)

**Original and Review Decisions** (includes General, Community Services, Retail Leases and Revenue Divisions, but does not include professional discipline or Equal Opportunity Division matters)

- 75% of matters disposed of in less than 6 months (85%)
- 92% of matters disposed of in less than 1 year (100%)
- Clearance ratio\* - 92%

**Equal Opportunity Division** (other than review matters)

- 81% of matters disposed of in less than 1 year (80%)
- 94% of matters disposed of in less than 2 years (100%)
- Clearance ratio\* - 78%

**Professional Disciplinary Decisions**

(includes Legal Services Division and General Division cases)

- 67% of matters disposed of in less than 9 months (90%)
- 77% of matters disposed of in less than 1 year (100%)
- Clearance ratio\* - 59%

**Appeals**

(includes internal and external appeals)

- 80% of matters disposed of in less than 6 months (80%)
- 93% of matters disposed of in less than 1 year (100%)
- Clearance ratio\* - 118%

\*clearance ratio is the percentage of cases disposed of divided by cases lodged over the last 12 months.

# Appendices

## Appendix G: Rule Subcommittee Membership

Administrative Decisions Tribunal Subcommittees of the Rule Committee - Membership  
(section 97 *Administrative Decisions Tribunal Act 1997*)

### General Division

1. Divisional Head: Judge Kevin O'Connor
2. Judicial member: Simon Rice
3. Non judicial member: Mary Bolt
4. Community/special interest member: Wayne Kosh, Ombudsman's Office
5. Community/special interest member: Simon Moran, Public Interest Advocacy Centre
6. Community/special interest member: Brad Row, Law Society's Standing Committee for Government solicitors

### Community Services Division

1. Divisional Head: Tom Kelly
2. Judicial member: Anne Britton
3. Non judicial member: Jenny Green
4. Community/special interest member: Robert McLachlan, Law Society's Standing Committee on Children's Legal Issues
5. Community/special interest member: Robert Ludbrook, Acting Director of the National Children's and Youth Law Centre
6. Community/special interest member: Craig Waricker, Commission for Children and Young People

### Equal Opportunity Division

1. Divisional Head: Magistrate Nancy Hennessy
2. Judicial member: Graham Ireland
3. Non judicial member: Owen McDonald - to 8 October 2003
4. Community/special interest member: Legal Aid Commission representative
5. Community/special interest member: Raoul Salpeter, Crown Solicitor's Office
6. Community/special interest member: David Hillard (or his nominee), Clayton Utz

### Retail Leases Division

1. Divisional Head: Acting Judge Michael Chesterman
2. Judicial member: Bruce Donald
3. Non judicial member: Betty Weule
4. Community/special interest member: Ken Carlsund, Retail Tenancy Unit
5. Community/special interest member: Bill Healey, Executive Director, Australian Retailers Association
6. Community/special interest member: Lexia Wilson, Property Council of Australia

### Legal Services Division

1. Divisional Head: Acting Judge John Nader QC
2. Judicial member: David Officer
3. Non judicial member: Dr Michael Costigan
4. Community/special interest member: Steve Mark, Office of the Legal Services Commissioner
5. Community/special interest member: Ray Collins, Law Society
6. Community/special interest member: Peter Garling, Bar Association

