



THE COUNCIL OF AUSTRALASIAN TRIBUNALS: THE NATIONAL PERSPECTIVE

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President of the Administrative Appeals Tribunal**

**Speech at a General Meeting of the South Australian Chapter
of the Council of Australasian Tribunals**

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Introduction

Thank you for inviting me to speak at this general meeting of the South Australian Chapter of the Council. I note that it is now almost three years since I spoke to you at the meeting which established this chapter. It is pleasing to see that the South Australian Chapter continues to be an active and valued part of the Council.

When I spoke to you in 2004, I did so in my capacity as Chair of the Council. In June, this role passed to Kay Ransome, Chairperson of the New South Wales Consumer, Trader and Tenancy Tribunal. I will speak to you today about the Council from the position of a well-informed bystander rather than as an office holder.

I will take the opportunity this evening to give you an update on the present state of the Council, its current activities and proposals for future projects. I will also touch on some recent developments in the Administrative Appeals Tribunal that may be of interest to tribunals and tribunal members generally.

Council Membership

The Council regularly receives queries about its role and functions and the services that it offers to tribunals and tribunal members. The Council also receives a number of queries relating to the definition of a tribunal for membership purposes. As you may be aware, the Council's Constitution defines a tribunal as:

any Commonwealth, State, Territory, or New Zealand body whose primary function involves the determination of disputes, including administrative review, party disputes and disciplinary applications but which in carrying out this function is not acting as a court.

The Council recognises that there is no one model for a tribunal – a tribunal may take many forms depending on the powers it exercises and the types of decisions it makes. The Council's membership is therefore quite diverse in terms of the types of bodies that are members. The membership is also diverse in terms of location, jurisdiction and size.

Current member tribunals range from large organisations such as the Commonwealth Administrative Appeals Tribunal of which I am the President, the New South Wales Consumer Trader and Tenancy Tribunal and the Victorian Civil and Administrative Tribunal. Smaller, more specialised tribunals include the Copyright Tribunal, the South Australian WorkCover Levy Review Panel and the New Zealand Human Rights Review Tribunal. The tribunals most recently admitted to membership include the Northern Territory Licensing Commission, the Chiropractors and Osteopaths Registration Board of Tasmania and the Dental Tribunal of New South Wales. Each of these tribunals contributes to the diversity of the Council's membership and adds to the potential for a rich exchange of ideas and information about tribunal practices and experience. This is essentially what brings us here today.

In statistical terms, the Council currently has 85 members. Membership applications received from a further three tribunals will be considered by the Council's Executive at its next meeting on 16 August. In terms of the jurisdictional distribution of the Council's members, New South Wales has the highest number of member tribunals with 17. New South Wales is closely followed by 14 Commonwealth Tribunals. I am pleased to note that there are 11 member tribunals in South Australia. There are also 7 member tribunals from New Zealand and one from the Northern Territory. With at least one member tribunal in every jurisdiction, the Council is truly an Australasian organisation.

As you may be aware, the Council began levying membership fees in 2005, predominately for the purpose of identifying and pursuing projects for the benefit of the membership. I will speak about these shortly. As at 31 July, the Council had over \$70,000 in its bank account and therefore has the financial capacity to undertake some significant projects. I understand that reminders for the next round of membership levies will be sent out shortly which will add further to the financial resources available to the Council. The Council's financial statements are available on the website if you would like further information.

The Council's 2007 Annual General Meeting

The Council held its Annual General Meeting in early June in Melbourne. As I mentioned earlier, I stood down as the Chair of the Council after four years in that position. I was pleased that Kay Ransome agreed to take on the role of Chair. She has an extensive background in tribunals. She has been the Chairperson of the Consumer, Trader and Tenancy Tribunal, one of the largest tribunals in Australia, for the last five years. Prior to accepting that position, she was the Registrar of the Administrative Appeals Tribunal and had previously been a member of the Refugee Review Tribunal. I know she will bring fresh ideas and energy to the Council.

Patricia McConnell, Chair of the New Zealand Weathertight Homes Tribunal, is the Council's Deputy Chair. This is indicative of the significant contribution that New Zealand makes to the Council. Mr Michael Peedom, President of the Australian Capital Territory Administrative Appeals Tribunal of the ACT is the Secretary/Treasurer.

The Chair, Deputy Chair, Secretary and Treasurer form the Council's Executive together with the convenors of each of the State, Territory and New Zealand Chapters. Doug Humphreys, Registrar of the Administrative Appeals Tribunal remains the Executive Officer and has also taken on the role of Public Officer of the Tribunal following its incorporation last year under the New South Wales *Associations Incorporations Act 1984*. Incorporation means that the Council is better placed to manage the assets that it controls and to undertake activities that will require contracts with service providers.

Current and Future Council Projects

One of the Council's objects is to provide training and support for members of tribunals, particularly of smaller tribunals which may not have the resources to undertake such activities alone. This object has informed a number of the projects that the Council has pursued at the national level.

COAT Practice Manual for Tribunals

The Council's first major project, which came to fruition last year, was the development of the Practice Manual for Tribunals. This was envisaged as a resource that would provide practical information and guidance on issues that arise in a broad range of tribunals. The manual covers such areas as statutory interpretation, procedural fairness, conducting hearings and making decisions. It was intended that organisations with sufficient resources would be able to supplement the COAT manual with their own jurisdiction-specific material. For organisations without this capacity, the manual would provide a basic resource that would assist members to carry out their duties effectively.

The Practice Manual was funded jointly by the Australasian Institute of Judicial Administration and the Standing Committee of Attorneys-General. It was written by a team of writers from Monash University under the Council's supervision and was launched in April 2006.

A copy of the manual was distributed to the head of each of the Council's member tribunals in June 2006. The component parts of the manual were also made available in a password-protected area of the Council's website. The Council left it to each tribunal to determine how the manual should be made available as a resource to its members but offered to arrange the supply of further copies. The Council received orders for almost 1,000 copies of the manual from member tribunals. Interest in obtaining copies of the manual has encouraged a number of tribunals to join the Council. It remains a major marketing tool for the Council.

The manual has also generated interest from persons and organisations overseas. The United Kingdom's Council on Tribunals included an article on the manual in its newsletter *Adjust* in August 2006. Copies of the manual have also been sold to a number of other UK organisations.

The interest from domestic tribunals and international bodies demonstrates to me that the Council has achieved its objective and produced a relevant and practical tool for a broad range of tribunals. To remain relevant, however, it needs to be easy to read and updated regularly.

While it is possible to view and search individual chapters of the manual online, there are limits to using the manual online in its current format. For example, there are no hyperlinks from the table of contents or the index to the main text of the manual. One of the Council's identified projects for the coming year is to make the online version of the manual more effective. The Council will be examining options for publishing the manual in a form that has better navigation and searchability and can be updated simply and efficiently.

The Council is also considering options for undertaking a basic review of the manual's content. This is likely to involve identifying and filling any gaps in the existing content as well as ensuring that the content continues to be accurate and relevant. Reports on areas of the manual that may need to be looked at would assist the Council in this process.

Tribunal Leadership Course

In late 2006, the New Zealand Chapter of the Council arranged a Tribunal Leadership Conference. The conference was conducted over a three-day period in New Zealand and was attended by 38 tribunal heads and other members with leadership responsibilities. I attended the course, along with 17 other delegates from Australian tribunals.

The conference covered a range of topics relating to managing tribunals and members, including leadership skills and challenges, aspects of performance management, training for members and staff and dealing with the media. The course was an outstanding success and provided an excellent opportunity for delegates to share experiences and exchange information. It is likely that the course will be repeated in 2008 in Australia which may allow more delegates from across Australia to attend. Consideration is also being given to holding a follow-up course for more experienced tribunal leaders to build on what was covered in the initial course.

Remuneration Survey

The Council maintains on its website a summary of rates of remuneration for members in various tribunals across Australia and New Zealand. This survey of remuneration rates is a work in progress which the Council's Executive Officer, Doug Humphreys, attempts to keep as up to date as possible. The Council is reliant on tribunals providing information for the purposes of the survey.

While the Council recognises that publishing information on remuneration levels can be sensitive, the survey provides very useful comparative information for tribunals across Australia and New Zealand. I am aware that information from the Remuneration Survey has been used by member tribunals in making submissions to Government in respect of the appropriate level of remuneration for members of tribunals. I would urge you to look at the Council website and provide an update of any information contained there in relation to your tribunal. If information is not included in relation to your tribunal, I would encourage you to provide information on your tribunal's remuneration rates to Doug Humphreys.

Survey of Appointment and Reappointment Processes

Another sensitive area in relation to which the Council is currently undertaking some work relates to the appointment and reappointment of tribunal members. Anecdotally, it is clear that there are differences between tribunals in relation to matters such as whether membership vacancies are advertised, whether selection criteria have been developed for member positions as well as the actual processes for selecting, appointing and reappointing members. The Council decided that it would be useful to collect information about the processes in place for appointing and re-appointing tribunal members in Australia and New Zealand.

The Council circulated a survey to the heads of all member tribunals in late 2006 and early 2007. It may have taken some time to complete and, on behalf of the Council, I would like to thank all of the tribunals who responded. Responses were received from 36 tribunals across a range of jurisdictions. There is a good cross-section of large and small tribunals.

The survey responses are currently being analysed and it is anticipated that a report will be provided to the Council's Executive later in the year. The Executive will then determine what further work may be undertaken in relation to this topic.

Online Induction Course

The next major project that the Council will be pursuing is the development of an online induction course for new tribunal members. One of the great strengths of tribunals is the diversity among their members. People with a range of qualifications and skills, both legal and non-legal, are appointed to tribunals. Induction is important for new starters in any organisation but is particularly important for new tribunal members, many of whom may not have worked previously in a tribunal or a legal environment.

The online induction course will assist new members to come to grips with their role and deliver information relevant to carrying out their duties. It will cover some of the same areas that are dealt with in the COAT Practice Manual and is a natural companion to that publication. The course is likely to be of particular benefit to smaller tribunals that may not have the resources to organise their own induction program. Larger tribunals may use the course to supplement existing induction and development programs. The availability of an online induction course will be particularly helpful for new members who may be appointed some time before an in-house induction course is to be held.

The Council is currently examining options for designing and delivering the induction course. There are a number of bodies that may be well-placed to assist the Council in developing such a course. The likely costs for participants will also need to be considered to ensure that smaller tribunals are able to benefit from the course being available.

Other Potential Projects

I mentioned earlier that a further Tribunal Leadership Conference is likely to take place in Australia next year. A possible spin-off from this would be a course for Tribunal Registrars and Chief Executive Officers that would cover similar material.

Numerous other good ideas have been raised that the Council could pursue. These include: electronic induction courses for registry staff and a TAFE Certificate IV course in tribunal procedures for registry staff which would be similar to the existing TAFE course for court registry staff. Each of these would add to the body of material available for tribunals as a whole, both members and staff.

While there are many possible projects, it is important to remember that the organisation does not have any dedicated staff and relies on tribunals making members and staff available to work on projects. Appropriately, the Council's approach is to focus on a small number of projects any one time that can be completed well within a reasonable time.

Activities in Other Chapters

I have been focussing to this point on the activities of the Council at the national level. I think it is also worth noting some of the activities that have been taking place in other chapters to give you a sense of the range of what is happening within the Council.

The New South Wales Chapter has been the most active of the Council's chapters. In May this year, the Chapter held its fourth annual one-day conference. The conference theme was the quality of administrative justice and a number of high-calibre speakers were engaged to present on a range of issues, including the bounds of flexibility in tribunals and measuring the quality of administrative justice. The keynote address was delivered by David Bennett AO QC, the Commonwealth Solicitor-General.

Next month, the New South Wales Chapter has organised decision-writing workshops for tribunal members that will be led by Professor James Raymond, a recognised expert in this area.

The New South Wales Chapter has also decided to institute an annual lecture to be known as “The Whitmore Lecture”. As some of you may know, Professor Harry Whitmore taught administrative law at the University of Sydney and the University of New South Wales. He was also one of the members of the Kerr Committee, whose deliberations and report contributed significantly to the administrative law reforms of the 1970s. The inaugural lecture will be delivered by Sir Anthony Mason on 19 September.

One final initiative of the New South Wales Chapter that I will mention is that it produces a newsletter, known as *COATNEWS*, which is distributed to members twice each year. It provides an update on the Chapter’s activities as well as information on interesting legal developments and other events that may be of interest to the members.

Lectures and seminars have been organised by other chapters on a range of topics during the last year. In September last year, the Tasmanian Chapter arranged a lecture given by Peter Underwood, Chief Justice of Tasmania on tribunal independence. In October 2006, the Victorian Chapter held a seminar on therapeutic jurisprudence. On 20 August this year, the Australian Capital Territory Chapter will hold a lecture on bias in court and tribunal proceedings in association with the Australian Institute of Administrative Law.

These kinds of activities are at the heart of what the Council is designed to achieve. The Council provides learning and networking opportunities which serve to enhance the richness of the tribunals scene in Australia.

Anniversary of the Administrative Appeals Tribunal

Tribunals have assumed an increasingly important role in Australia’s legal system over recent decades. They undertake a variety of tasks. They review a wide range of government decisions. They resolve many types of civil disputes. They conduct disciplinary proceedings. They also make decisions in relation to people who have impaired decision-making capacity. Tribunals determine matters that have a significant impact on the lives of individuals.

Members of the public are more likely than ever to find themselves before a tribunal rather than a court. As Chief Justice Gleeson remarked on the occasion of the thirtieth anniversary of the Administrative Appeals Tribunal last year:

The civil justice system only manages to function because the great majority of cases are resolved without the need for a judicial decision.¹

To illustrate this point, I note that the Victorian Civil and Administrative Tribunal received almost 89,000 applications in 2005-06. The NSW Consumer, Trader and Tenancy Tribunal received over 60,000 applications. The Commonwealth administrative review tribunals together received just over 30,000 applications in that period.

It is interesting to reflect on how much has changed in 30 years. While tribunals existed in Australia both at the Commonwealth and State level long before the 1970s, there were not so many of them. Tribunals have grown in number and established themselves as an integral part of Australia's legal landscape during that period.

On 1 July last year the Administrative Appeals Tribunal celebrated its thirtieth anniversary. A commemorative ceremony was held in Old Parliament House to mark what is, for any organisation, a significant occasion. For an organisation that was such a bold experiment at the time of its establishment, it is quite an achievement.

While the ceremony provided a welcome opportunity to reflect on the Tribunal's history, the AAT is also firmly focussed on the future and has been actively reviewing its operations. Like any tribunal, if the AAT is to remain an institution that is valued and relevant, it must ensure that its processes continue to be effective and efficient, and that its decisions are of the highest quality.

¹ Administrative Appeals Tribunal, *30th Anniversary Speeches*, 2007, p 10.

Communicating Effectively with Tribunal Users

Communicating effectively with parties and their representatives is an essential aspect of ensuring that the AAT's process operates efficiently. Parties must understand how the AAT operates and what is expected of them. As for many tribunals, there is a great diversity in the users of the AAT. They range from self-represented parties who come from a wide variety of backgrounds to advocates and lawyers. The information needs of users of the AAT are diverse.

The AAT is currently undertaking a review of the way in which it communicates with users. The first stage of the review involved engaging a consultant to assess the AAT's existing communication strategies and information products. The consultant's report appears to confirm that the Tribunal's general approach is sound and, in particular, emphasises the value of personal contact with self-represented parties.

The AAT has an outreach program for self-represented parties. At an early stage of the review process, an AAT staff member contacts a self-represented person by telephone to explain the Tribunal's processes and answer any questions the person may have. The outreach call enables the Tribunal staff member to discuss with the person whether he or she requires any special assistance during the review process. It also offers an opportunity to let the person know about any organisations or services that may be able to provide assistance.

The consultant's report identifies a number of ways in which the AAT's existing strategies and products can be improved, as well as a number of additional strategies and products which will address particular information gaps. The Tribunal will undertake a review of its website to improve navigation for different sets of users and will explore using more audio-visual material such as an online tour of the Tribunal's premises or small video clips of conferences or hearings.

Concurrent Evidence

The AAT has also been exploring ways in which the hearing process can be improved. One recent area of interest has been the use of the concurrent evidence procedure for taking evidence from expert witnesses. As you will be aware, concurrent evidence involves two or more experts giving evidence at the same time. It provides a forum in which, in addition to providing their own evidence, experts can listen to, question and critically evaluate other experts.

Concurrent evidence is not a new concept but one that has been embraced by the AAT. It has been successfully employed in several cases that I have decided. One case involved 16 expert witnesses on animal behaviour. They were collectively examined over four days. Before the hearing each witness prepared an expert report. They then met to identify areas of agreement or disagreement. At the hearing, each witness was allowed to outline their argument on the areas of disagreement. The process was time effective. It helped clarify the areas in dispute and assisted in the final decision-making. I have no doubt that it saved a number of days of hearing time had the matter proceeded in the traditional manner.

The benefits of using concurrent evidence are evident in large and complex cases of the kind I have described. In 2005, the AAT completed a study which examined whether it is a useful procedure in relation to the types of cases that the Tribunal deals with more frequently. Almost all of the cases included in the study were veterans' entitlements or workers' compensation cases involving expert medical evidence. Tribunal members reported that the procedure improved the quality of the expert evidence presented, made the comparison of evidence easier and enhanced the decision-making process. In relation to its impact on overall hearing time, the study revealed that in most cases the procedure led either to time savings or was neutral. However, individual experts tended to spend longer giving evidence which can have an impact on costs for the parties. The majority of representatives and experts expressed general satisfaction with the process and supported its continued use.

The Tribunal is currently developing guidelines in relation to the use of concurrent evidence. These guidelines will address how the Tribunal will identify and select cases in which the procedure will be used and the actual processes to be followed in taking concurrent evidence.

Making High-Quality Decisions

The AAT's case management process attempts, in the first instance, to assist the parties to reach an agreed outcome. Only a relatively small proportion of cases lodged with the AAT are determined by way of a decision following a hearing. However, this is not to diminish in any way the significance of the decision-making function of the AAT. It is the presence of predictable, high-quality decision-making that facilitates earlier consensual resolution. I would now like to refer to a number of developments within the AAT that are focussed on the quality of its decisions.

Professional Development of Members

As is the case for many tribunals, the AAT benefits from the appointment of members from a range of backgrounds and with a range of skills and experience. Many members appointed to the AAT have not worked in a Tribunal and some have not worked in a legal environment. Members need to be adequately trained and supported over time to carry out their role effectively. Providing adequate initial training and support contributes significantly to high-quality outcomes in relation to both procedural and substantive aspects of cases.

The AAT has developed a comprehensive members' professional development program. It comprises induction and mentoring for new members as well as an appraisal scheme for all members which is supported by regular professional development activities and training and development opportunities.

The program is based on a framework of competencies which sets out the skills, knowledge and behavioural attributes required of members to perform their functions competently. It was adapted from a set of competencies originally developed by the United Kingdom Judicial Studies Board. The Tribunal's competencies were the subject of extensive consultation with the membership prior to being settled. There are seven key competencies:

- law and procedure;
- fair and equitable treatment;
- communication;
- conduct of a hearing
- evidence
- decision-making; and
- facilitation and case management.

Shortly after appointment, new members attend a three-day induction program that is designed to introduce them to the operations of the Tribunal and their roles and duties. Following the induction program, new members undertake a practical orientation program involving observation of pre-hearing events and hearings. They may also undertake internal or external training on specific skills such as alternate dispute resolution processes and techniques. At induction, new members are matched to an experienced member who acts as a mentor throughout the induction phase.

The appraisal scheme assesses members' competence across the seven key competencies listed above. It involves self-appraisal and peer review with the aim of identifying current competency and devising a self-development plan to enhance competence. The appraisal is conducted by a member at the equivalent or more senior level of the member the subject of the appraisal. The process is confidential. Only the President has access to the material relating to each appraisal.

AAT members participate in a range of professional development activities. Professional development meetings on topics of interest are held at the AAT on a regular basis. In addition, the Tribunal holds a national conference every two years. Members are also able to attend internal courses presented on relevant topics as well as external courses, seminars and conferences on an ad hoc basis, including those organised by COAT.

The Professional Development Program is designed to be a comprehensive program which provides appropriate training and support on appointment, assists members to develop skills and reflect on their own practice over time and offers a range of opportunities for continuing education.

Decision Writing

Decision writing has been a particular focus of professional development within the AAT in recent times. AAT members have attended external courses, and a number of internal courses have been offered, the majority of which have been led by Professor James Raymond.

Decision writing is an important aspect of the work of any tribunal member. In my view, reasons for decision should provide a simple clear explanation of the issues and their resolution. A well-written decision should:

- be easily readable;
- interest the reader;
- state the issues at the outset, not the history of the litigation; and
- resolve the issues with the minimum of detail.

Adopting this approach will be of greatest benefit to the parties to the proceeding, particularly in assisting the party that is not successful to understand why the decision was made. However, it will also assist others who read the decision.

Decision writing workshops are conducted by a number of organisations, including the National Judicial College of Australia. I would encourage you as part of your own professional development to explore opportunities to attend a decision writing workshop to enhance your skills in this vital area.

Conclusion

The establishment of the Council of Australasian Tribunals in 2002 was a significant milestone in the development of the tribunals sectors in Australia and New Zealand. It provided a forum for tribunals to undertake projects and develop resources that meet the specific interests and needs of tribunals. The publication of the COAT Practice Manual was a significant achievement in this regard and I look forward to the development of the online induction program.

Activities organised by local chapters, such as this evening's meeting, are also a crucial part of what the Council was established to achieve. Networking opportunities and the exchange of information and ideas that takes place when members from different tribunals come together benefits not only the individuals who attend but also the organisations to which they belong. More than this, bringing tribunal members together to share experiences and learn from each other contributes to the establishment of a body of highly-skilled professional tribunal members. I wish the South Australian Chapter well in the coming year.