



## OPENING ADDRESS

**The Hon. Justice Garry Downes AM  
President of the Administrative Appeals Tribunal**

**Speech to the Inaugural Conference of the New South Wales Chapter of  
the Council of Australasian Tribunals**

**28 May 2004**

### **Establishment of COAT and its Objects**

Welcome to the Inaugural Conference of the New South Wales Chapter of the Council of Australasian Tribunals.

Some of you have been closely involved with the establishment of COAT and are well aware of its genesis and development. For others, today's conference may be your first contact with us. It may be useful therefore to outline briefly how COAT developed, its structure and objects and to provide the context in which today's conference is taking place.

The establishment of a peak body for tribunals was recommended by both the Administrative Review Council in 1995 and by the Australian Law Reform Commission in 2000. The proposals reflected the need for a forum that would enable the exchange of information and ideas and the coordination of cooperative initiatives.

In its *Better Decisions* report, the ARC recommended the establishment of a Tribunals Executive for the Commonwealth merits review tribunals.<sup>1</sup> The ALRC's recommendation in its *Managing Justice* report was for a broader-

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<sup>1</sup> Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, Recommendation 85.

based Council on Tribunals. The ALRC recommended that the Council include the heads of both federal and State tribunals engaged in administrative review as well as the President of the ARC. It would be a national forum for tribunals to develop policies, secure research and promote education on matters of common interest.<sup>2</sup>

In March 2001 the ARC undertook to progress the ALRC's recommendation in consultation with tribunals. The ARC developed a model for a Council of Australian Tribunals which would include the following features:

- COAT would be an informal body with broad objectives;
- membership would be open to all Commonwealth, State and Territory tribunals;
- COAT would operate nationally as well as establishing State and Territory chapters.<sup>3</sup>

The proposal had the strong personal support of the Commonwealth Attorney-General, Daryl Williams AM QC MP. A Steering Group comprising the heads of a number of Commonwealth and State tribunals was convened to develop the proposal further. Justice Murray Kellam lead the group. My predecessor, who is here, Justice Deidre O'Connor was very much involved.

The proposal developed by the ARC and the Steering Group lead to the formation of COAT on 6 June 2002 at a meeting of Commonwealth, State, Territory and New Zealand heads of tribunals. To reflect the inclusion of New Zealand tribunals, the body was named the Council of Australasian Tribunals. The meeting adopted a constitution which governs the Council's structure and operations and also sets out the Council's objects.

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<sup>2</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No. 89, Recommendation 10.

<sup>3</sup> Administrative Review Council, *Report on the Council of Australasian Tribunals*, October 2002, <http://www.ag.gov.au/www/arcHome.nsf/Web+Pages/90F78850B95F8A8ECA256CC4001816C6?OpenDocument>.

COAT is as an unincorporated association with a federal structure that consists of:

- a National Council comprising the Executive and member tribunals; and
- State, Territory and New Zealand chapters, each of which is headed by a Convenor.

The National Council consists of tribunals whose presiding officers were present at the meeting which established COAT and such other tribunals as apply for, and are admitted to, membership. Tribunals participate in the National Council through their presiding officer.

The definition of tribunal in the COAT constitution has deliberately been drafted broadly. It defines “tribunal” to mean:

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

Accordingly, COAT welcomes membership from administrative review tribunals as well as civil tribunals and from some private bodies as well as public bodies.

It was considered by the ARC that, rather than defining eligible bodies in detail, a broad definition would enable the many bodies falling within the definition to decide for themselves whether or not COAT is a body to which they wish to belong.<sup>4</sup>

The management and control of the affairs of COAT are vested in the Executive which comprises the Chair, a Deputy Chair and the Convenors of the State, Territory and New Zealand chapters. The Chair and Deputy Chair are elected at the Annual General Meeting of the National Council. Under the current Memorandum of Objects of State, Territory and New Zealand

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<sup>4</sup> Ibid. at 15.

Chapters, the Convenor of a chapter is to be the head of a tribunal operating in the relevant location who has been elected or appointed by the members of the chapter.

While membership at the national level of COAT is reserved for tribunals, membership of the State, Territory and New Zealand chapters is open to individuals. Importantly, local membership is open not only to members of tribunals who are members of COAT but also to practitioners, academics and other interested persons.

I am pleased to see here a wide range of participants for this inaugural New South Wales conference. I encourage those who have not already done so to become members of the NSW chapter. Active local chapters will be best-placed to contribute to the achievement of at least two of the objects of COAT:

- to provide a forum for the exchange of information and opinions on aspects of tribunals and tribunal practices and procedures; and
- to promote lectures, seminars and conferences about tribunals and tribunal practices and procedures.

The creation of opportunities for interaction between tribunals and tribunal members is one of the most important aspects of the establishment of COAT. Other objects of COAT set out in the constitution include:

- to establish a national network for members of tribunals to consult and discuss areas of concern or interest and common experiences;
- to provide training and support for members of tribunals;
- to develop best practice or model procedures rules based on collective experience of what works;
- to develop performance standards for tribunals;
- to provide advice to governments on tribunal requirements;
- to publish and encourage the publication of papers, articles and commentaries about tribunals and tribunal practices and procedures; and

- to cooperate with institutions of academic learning, and with other persons having an interest in tribunals and tribunal practices and procedures in promoting COAT's objects.

The objects specified in the constitution provide a clear sense of direction for the Council. They also identify a wealth of potential work that the Council may undertake.

### **The Current State of COAT**

Since the Council was created in June 2002, a number of dedicated individuals, many of whom are here today, have been working hard to establish and consolidate the constituent parts of COAT. Clearly, the establishment of a functioning organisation is a prerequisite to the achievement of the objects that have been identified for COAT.

Establishing the network of State, Territory and New Zealand chapters is a vital step in making COAT an active and vital organisation. I am pleased to note that chapters have been established not only in New South Wales but also in the ACT, Queensland, Tasmania, Victoria and New Zealand. Encouragingly, local chapter committees consist of representatives from the broad range of tribunals that may be members of COAT including:

- Commonwealth, State and Territory tribunals;
- tribunals undertaking diverse functions including the resolution of disputes between private citizens, those conducting administrative review and disciplinary tribunals; and
- small and large tribunals.

The breadth of membership of the local chapters is an important feature of COAT that will encourage sharing of information and experience and cross-fertilisation of ideas.

At the national level, an Interim Executive was formed on the creation of COAT with Justice Murray Kellam, as Chair, playing an indispensable role in laying the groundwork for building a national organisation. At COAT's first

Annual General Meeting on 5 June 2003, the Interim Executive was replaced by the first elected Executive. I was elected Chair and John Lesser, President of the Mental Health Review Board of Victoria, was elected Deputy Chair. Convenors of the chapters in the ACT, New South Wales, New Zealand, Queensland and Tasmania became members of the Executive.

Of course, the Executive did not include representatives from those locations without a local chapter. To address this issue, the COAT constitution was amended to allow the Executive to co-opt presiding officers of a COAT member tribunal where no local chapter has been established or as is otherwise appropriate to assist the business of the National Council. Given this change, I approached a number of people in the Northern Territory, South Australia and Western Australia to join the Executive. I am pleased to report that the Executive is now a body that has truly national representation.

Like the local chapter committees, the Executive comprises representatives from a diverse range of tribunals. This can only serve to benefit the organisation as it moves from the initial establishment phase to a period of consolidation and growth.

### **The Current and Future Activities of COAT**

Today's conference, which I trust will be the first of many, is an excellent example of the activities that are part of the next phase of COAT's development. A conference of this kind provides the opportunity for a diverse range of people to come together to get to know each other and the work that we do in our different tribunals as well as to discuss issues relating to tribunals. Importantly, it provides a forum for papers and presentations that will encourage reflection, provoke thought and generate ideas about the way in which we do our work.

I am aware that local chapters have organised seminars and conferences in the ACT and in Queensland. Papers presented at a seminar held in Queensland on 14 February 2003 are available on the COAT website.

I hope that many of you have already visited the COAT website or will do so in the future. It already contains a range of information about COAT, including the register of tribunals. It has many potential uses and will undoubtedly grow and change with the organisation. I am confident that the website will be one of the ways in which we create a vibrant Australasian organisation.

Separate pages have already been established for the New South, Queensland and Victorian chapters. I have every expectation that information on the activities of each local chapter will be available in the future. The website offers an easy way for local chapters to advertise and provide information on forthcoming seminars and conferences. Papers presented at these events can be made available for download and will therefore be accessible to members and interested persons in other locations. As the number of papers available on the website grows, the website will become an increasingly valuable resource on tribunal-related issues. This can only be a positive development for improving the general awareness and understanding of tribunals and their issues.

Clearly, COAT is not the only organisation in Australia and New Zealand which has an interest in issues relating to tribunals. The Australian Institute of Administrative Law and the Australian Institute of Judicial Administration are two organisations that spring immediately to mind. I am aware that many members in local chapters of COAT are active in these and other organisations with overlapping interests.

The functions and interests of COAT are distinct in some respects from such organisations but this does not detract from the desirability of working cooperatively with them. Opportunities exist for jointly organised seminars and conferences and joint projects to the mutual benefit of the organisations involved.

An example of this cooperation is the forthcoming Seventh Annual Tribunals Conference organised by the AIJA. Many of the participants in the

conference sessions are also active members of COAT, both at the national level and in local chapters. Moreover, COAT will hold its Second Annual General Meeting on the morning of the tenth of June, the first day of the AIJA conference.

One of the matters to be considered at the Annual General Meeting of the Council is the issue of funding for undertaking the activities of COAT. When the ARC developed the proposal for COAT, it proposed a self-funding model similar to that which operates for the Council of Chief Justices whereby each tribunal would bear its own costs.<sup>5</sup> Each tribunal would be free to negotiate resources with their respective government. The ARC noted that formal arrangements relating to funding would have required agreement at ministerial level. This would have become more complicated if COAT were to be jointly funded by the Commonwealth, States and Territories. The ARC also observed, however, that COAT would have the capacity to make the case for alternative funding arrangements, if necessary.

The funding model proposed by the ARC was adopted when COAT was established and there is no requirement for membership fees. It was decided that secretariat services would be provided by the tribunal to which the Chair belongs enabling these costs to be shared among different tribunals over time. The issue of how other particular activities of COAT at the national or local level would be funded was left unresolved.

This is an issue that must be given consideration if COAT is to be in a position to undertake the range of potential activities that will contribute to the achievement of its objects. This is particularly so in relation to larger scale, and therefore more expensive, projects that would be coordinated at the national level.

Two proposals relating to this issue are to be put to the National Council at the AGM. The first is that the Council approach Commonwealth, New

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<sup>5</sup> Ibid. at 16.



Zealand, State and Territory governments to provide seed and/or annual funding for the activities of COAT. The second is that the Council, in conjunction with the State and Territory chapters, determine an appropriate funding model and financial arrangements for undertaking the activities of COAT at both national and local level. This would explore a range of funding possibilities including the levying of membership fees and different methods of cost recovery including contributions by tribunals for particular projects. It would also consider how the Council's finances should be arranged at the national and local level. Establishing some clear guidelines about these matters is another important step in COAT's development.

Another significant matter to be considered by the National Council at the AGM is the first major project that COAT is considering undertaking at the national level. COAT is interested in developing a generic practice manual for tribunals which would assist members to carry out their duties in the broad range of tribunals that exist in Australia and New Zealand. The COAT Executive has established a subcommittee to examine and coordinate the project.

The large number of tribunals in Australia and New Zealand are marked by their diversity not only in relation to jurisdiction but in relation to their size, their location and membership profiles. Despite the many differences that exist between tribunals, COAT considered that there is a central set of issues and skills that are common to members of tribunals who must conduct hearings and make decisions. COAT took the view that a manual could be a resource that would provide practical guidance to tribunal members in dealing with issues that commonly arise in tribunals.

One of COAT's objects that I referred to earlier is to provide training and support for members of tribunals, particularly in smaller tribunals which may not have the resources to undertake such activities alone. This object reflects the fact that the level of resources available in tribunals to produce a practice manual or for professional development activities such as induction and

training varies widely. The development of a generic practice manual would contribute to the achievement of this object.

In consultation with COAT, the Administrative Appeals Tribunal engaged Livingston Armytage, Director of the Centre for Judicial Studies, to undertake some preliminary work relating to the development of such a generic practice manual. The work to be undertaken included:

- an assessment of the needs of tribunal members for a generic practice manual;
- considering the audience and educational objectives for the manual;
- advice on the content of the manual as well as the preferable format and style for the content; and
- advice on the production of the COAT bench book.

As part of the assessment of the needs of tribunal members for the manual, Mr Armytage conducted consultations with tribunal members from a range of different tribunals in Melbourne and Sydney. In workshops and one-on-one interviews, Mr Armytage explored the professional development needs of tribunal members, the priority audience for a manual of this kind and its content.

I received the final report of the consultant this week. It contains a range of recommendations relating to the development of a practice manual which would aim to establish, promote and support a universal benchmark standard of competence and best practice for all tribunal members on common issues. The report and its recommendations and the further progress of this project will be discussed with the COAT subcommittee, the National Council and with tribunal members and other interested persons during a session at the AIJA Conference in Brisbane.

I hope this analysis of COAT and what it is trying to achieve demonstrates the importance of national and cross Tasman links between Tribunals. It seems to me that international links are also important. The more diverse the field of contact becomes the more there is to be taught and learned.

## **The Uniqueness of Our System**

Last month I had the privilege of representing the Administrative Appeals Tribunal, and indirectly the Council of Australasian Tribunals, at the Congress of the International Association of Supreme Administrative Tribunals in Madrid. I also spent a week in London in meetings with representatives of the Council on Tribunals, the Judicial Studies Board, and many English tribunals including the Appeals Service, the Immigration Adjudicators, and the Social Security and Child Support Commissioners.

One thing which my visit did was to reaffirm the uniqueness of the general administrative review tribunals of Australia. There is nothing like them in the common law world. There is nothing like them in the civil law world. This observation is not new. However, we may tend to forget it in our daily activities because of the uniformity of the system in Australia and the increasing tendency for general administrative review tribunals to be established.

The now well established label which is given to the role of administrative review tribunals in Australia is that they provide “merits review”. This was how Sir Andrew Leggatt distinguished Australian tribunals in his Report to the United Kingdom Government on tribunal reform called *Tribunals for Users: One System, One Service* (March 2001). He said this: “Particularly over the last 25 years, Australian tribunals have developed an admirable and distinctive approach to their role in merits review. There is much to be gained from comparing that system with ours. It is even possible that the UK system might have developed in a similar way. That was considered but rejected by the Franks Committee (para. 2.5).”

There is another way to describe the uniqueness of the Australian system. Where the Australian system differs from the rest of the world is that general tribunals are empowered to substitute their decisions for the decision of original decision-makers. The power to substitute a decision is the essence of

the statutory exposition of the powers of Australian administrative review tribunals.

The original provision is contained in s 43 of the *Administrative Appeals Tribunal Act 1975*. Section 43 authorises the Tribunal to set aside the decision under review and make a decision “in substitution for the decision set aside”. The statutes establishing the Victorian Civil and Administrative Tribunal (s 51), the Administrative Decisions Tribunal of New South Wales (s 63), the Commercial and Consumer Tribunal of Queensland (s 104) and the proposed State Administrative Tribunal of Western Australia (s 29) all use similar words incorporating the phrase “in substitution”.

It is the concept of the substitution of a decision by the reviewing tribunal which the rest of the world finds surprising. Merits review exists in the United Kingdom but only by specialist tribunals and only at the first tier level. For example, the Appeals Service in the United Kingdom is the equivalent of the Social Security Appeals Tribunal in Australia. Its statute does not authorise it to substitute a decision but it is well accepted that its role is to provide merits review. The appeal in the United Kingdom from the Appeals Service is to the Social Security and Child Support Commissioners. That is an appeal on a question of law only. There is no second tier merits review appeal in the United Kingdom which is equivalent to the appeal in Australia to the Administrative Appeals Tribunal. The Commissioners have no power to substitute their decision for the decision of the Appeals Service.

The administrative review system in civil law countries is quite different to the common law system. The French model is one of a system of administrative courts which are quite separate from the civil courts. However, the existence of a separate structure does not mean that the courts and tribunals within that structure have greater powers. Broadly, the role of the civil code administrative tribunals is to accord what we would call judicial review of administrative decisions. French administrative courts have a narrow power to substitute decisions but this is generally confined to disputed election and tax cases. Italian administrative courts have a limited power to remake

decisions when the original decision-makers do not comply with a direction to reconsider. Otherwise, administrative review in civil code countries is confined to review on grounds of error of law.

What distinguishes Australia, therefore, and particularly the Administrative Appeals Tribunal, is the conferring of jurisdiction upon general tribunals to substitute their decisions for the decisions of Ministers of the Crown and their delegates, Government departments, Government agencies and others. It is a very extensive jurisdiction.

The width of the powers of the Administrative Appeals Tribunal was recognised very early in its history when Sir Gerard Brennan, subsequently Chief Justice of Australia, was President. The issue arose in the context of Government policy. The question was, how extensive were the powers of the Administrative Appeals Tribunal to review Government policy? In other parts of the world the idea that the question might even arise would be breathtaking.

In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, the Full Federal Court accepted that it was appropriate for the Administrative Appeals Tribunal to have regard to relevant Government policy but not to regard such policy as determinative where, on the material before the Tribunal, the correct or preferable decision departed from the policy. Nevertheless, the court recognised the significance of Government policy and the caution that the Tribunal should exercise before departing from it.

Sir Gerard Brennan placed particular emphasis on this aspect in *Drake and Minister for Immigration and Multicultural and Ethnic Affairs (No. 2)* (1979) 2 ALD 634. He recognised that laying down policy “is essentially a political function, to be performed by the Minister who is responsible to the Parliament ...” He concluded that the Tribunal should adopt “a practice of applying lawful ministerial policy, unless there are cogent reasons to the contrary.”

Accordingly, in the early years of its existence, the Administrative Appeals Tribunal recognised that it was subject to restraints upon the extent of its decision-making. In recognising the existence of restraints and linking them to the separate nature of the political process, I think Sir Gerard Brennan was right.

Governments and legislatures in other parts of the world have simply not been prepared to give up discretionary decision making, let alone policy decision making, to bodies outside the political process. In the United Kingdom, Canada and New Zealand there are specialist tribunals, usually associated with the Government departments whose decisions they review, who provide a first tier level of merits review. There are generally no second tier tribunals providing merits review and no general tribunals at all providing merits review. In civil law countries there are general tribunals but, with limited exceptions, they can only act in cases of error of law. Administrative decision making and particularly discretionary and policy decision making outside Australia, remains with Executive Government.

The obligation of general administrative review tribunals in Australia to make the correct or preferable decision in every case has now been established for 25 years. It predates the creation of most of Australia's general administrative review tribunals. There are, however, occasions for restraint in reconsidering Government decisions. Policy is an obvious and significant example. There will be few occasions for any conscious consideration of restraint in the bulk of cases in our review tribunals. Social security and Commonwealth employees' compensation cases will usually not throw up such issues. But not always. Applications in which policy considerations are more likely to arise include, in the case of the Administrative Appeals Tribunal, civil aviation issues, broadcasting licences, securities industry licences and even migration cases. Tribunals should always be conscious of the need to recognise occasions for restraint. We should be conscious of the extent of our powers by contrast with those in other countries.

Our administrative review system in Australia is unique. I was pleased to be reminded of this in my recent visit to Europe. We should all remind ourselves of it, with pride, from time to time.

Welcome again to the Conference. I hope you, like me, are looking forward to a productive and rewarding day which will help us to better serve Australians through our tribunal systems.