

COAT NEWS

NEW SOUTH WALES

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DATES FOR THE DIARY

19 May 2015
9th Annual Whitmore
lecture

WHITMORE

4 and 5 June 2015
COAT (National)
Annual Conference
Melbourne

28 August 2015
COAT (NSW) Annual
Conference
Amora Hotel Sydney

Convenor's Corner

Welcome to the first COAT News for 2015

In this edition, Debra Jopson continues her series on life behind the scenes in the world of tribunals, this time featuring the Veterans' Review Board (page 2). This edition also carries our regular features, including case notes of interest (page 7) and tribunal comings and goings (page 10).

The first training project produced by COAT (National) in partnership with the National Judicial College of Australia will be launched in early May (see page 9). The project, a course on decision-making, draws on the College's considerable on-line training experience. The development of the project was overseen by senior members of tribunals and the judiciary. COAT was ably represented by Anina Johnson, Deputy President, Mental Health Review Tribunal and Nancy Hennessy, Deputy President of NCAT and head of NCAT's Administrative & Equal Opportunity Division. I extend our thanks to Nancy and Anina for taking time out of their busy schedules to undertake this important work.

Another vital COAT initiative currently underway, is the development of guidelines for tribunal appointments. The project builds on the report, *Tribunal Independence* prepared by Professor O'Connor on behalf of COAT and the Australasian Institute of Judicial Administration in 2013. In that report, Professor O'Connor identified 'institutional independence'—which she defined to include the processes used to determine tribunal appointments—as a key indicia of tribunal independence. COAT asked Prof O'Connor to build on this work and prepare model guidelines to use in tribunal appointments. The project is overseen by a working party, made up of members of the judiciary and tribunals: the Hon. Justices David Thomas, Iain Ross, John Chaney, John Byrne, Michelle May, Duncan Kerr and Kathleen McEvoy, Linda Crebbin and Anne Britton. A draft set of principles and recommended legislative provisions will be released for comment within the next month. Heads of Tribunals and COAT members will be invited to make submissions about the draft guidelines. A meeting of COAT members will be held in Sydney in July to consider the report (details to be advised, see page 9).

As previously announced, His Honour Justice Stephen Gagler will deliver the ninth Whitmore lecture on 19 May 2015. His Honour is the first serving High Court judge to deliver the lecture. He joins a distinguished list of Whitmore alumni, including retired High Court judges Michael Kirby AC CMG and Sir Anthony Mason AC KBE, Her Honour, Ruth McColl AO and Emeritus Professor Gillian Triggs. All COAT members are urged to attend. (See 9 for further details).

I hope you enjoy this issue of COAT News. Thank you for your continued support of COAT.

Anne Britton
COAT (NSW) Convenor

A day in the life of the Veterans' Review Board

Debra Jopson continues her series looking behind the scenes at the workings of tribunals. Here she spends a day among the veterans, tribunal members and war widows that are part of the daily dealings of the Veterans' Review Board.



Image: Courtesy of Department of Defence.

The war veteran is only 30 and just a few years ago fought in the Army, liaising with warlords on the frontline of Australia's battle against the Taliban in Afghanistan.

His official files heaped in front of lawyer Jenny D'Arcy reveal that he speaks Pashto and that war wounds, both visible and invisible, made it impossible for him to remain in active service.

Whatever courage it took to live in a war zone has deserted him on this autumn day. A trip from his out-of-town home to an office near Sydney's Central station has rendered the veteran a bundle of nerves.

The fear he learnt to suppress as a soldier now haunts him in a windowless, grey-carpeted room where Ms D'Arcy and two other members of the Veterans' Review Board (VRB) welcome him.

The soldier has been diagnosed as suffering post traumatic stress disorder (PTSD) as a result of his service. He has had to take heavy painkillers for spinal pain just so he can sit opposite the members and give evidence about his multiple war-induced illnesses, in support of his claim that he should receive a more generous veteran's pension.

'On paper, he's the most ill man I've seen ... He's seen some extraordinarily ugly stuff, including several friends being killed in aircraft accidents,' Ms D'Arcy, the presiding member, says.

Under government rules for assessing veterans' service-caused afflictions, the soldier has been recognised as suffering 12 conditions, including tinnitus and a recurring facial skin rash.

'Anger management is one of his issues. In a flash of temper, he protests when Ms D'Arcy questions him about his hypertension and sleep apnoea, but it's all over in a few minutes. The members have enough evidence.'

The soldier contends that the public servant who determined how much pension payment he should receive underestimated his disabilities when allocating points for each of his service-related incapacities.

VRB member Retired Air Commodore Bruce Wood tries to ease the veteran's discomfort.

'In your short service career, you have seen and done things [other] people would never do in a whole career. We appreciate your service ... We'd like you to relax. You're among friends,' he says.

This is no adversarial setting. The Review Board was established under beneficial legislation and the members will use it as best they can to help the soldier.

For almost half of the 3,288 cases it finalised in 2013-14, the VRB set aside decisions made concerning individuals under the Veterans' Entitlements Act or the Military Rehabilitation and Compensation Act.

The VRB's Principal Member Doug Humphreys describes the board as 'quality assurance.'

'The Department of Veterans' Affairs makes tens of thousands of individual decisions a year. We only see some of them. We tend to find that what happens when they come here is, better material and more evidence is provided. That allows us to make a favourable decision,' he says.

The soldier is frank. He speaks of being uncertain about his identity, as a student who yearns to fit in at university, but who is still officially a serving member of the Australian Defence Force.

'I am struggling ... I am a bit of a lost child at the moment,' he says.

He is partially deaf and fears standing out as disabled at university. 'I am 30, sir. Wearing a hearing aid scares me,' he says.

His advocate, Peter Ellis of Illawarra Veterans Entitlement Service lists the man's various injured body parts and argues why the official assessment is wrong. The veteran sits, straight-backed, as Mr Ellis and the tribunal discuss his knee, back, ears, brain and sex life. Sometimes, pain forces him to stand up.

He speaks wryly of his mental anguish as 'a bit of a brain gyro going at night.'

Ms D'Arcy notes that a departmental assessor gave him 68 points for PTSD and then reduced it to 38, even though the affliction appears not to have abated.

Doug Humphreys later explains that authorities readily accept acute physical injuries, clearly acquired in service, such as being shot in action.

The essence of the Board's work, however, is in the unseen service-related injuries and those which take time to crystallise, he says.

'The time lag for PTSD can be many, many years,' he says.

The sitting members decide that they need more up-to-date medical assessments of the soldier's multiple conditions and tell him he will have their

decision within a few months. The hearing has been sympathetic, but he leaves with his shirt is drenched in perspiration.

A 62-year-old veteran who has suffered PTSD since 1993 appears next, Mr Ellis also at his side.

His files say that while serving with the Royal Australian Air Force (RAAF) as an ambulance officer in Butterworth, Malaysia, the veteran tended to victims of several horrific motor accidents.

Back home, he experienced further trauma as part of a rescue helicopter team which retrieved the bodies of dead fishermen from NSW south coastal waters.

The veteran worked as a truck driver after he left the armed forces in 1990, but now says that his service-related PTSD is so bad, he can no longer work. He has applied for the highest rate of veteran's pension.

Anger management is one of his issues. In a flash of temper, he protests when Ms D'Arcy questions him about his hypertension and sleep apnoea, but it's all over in a few minutes. The members have enough evidence.

'I'm hoping this will be the end of it,' he grumbles as he leaves the room.

Australia is recognised as having the world's best repatriation system, according to Mr Humphreys. Even so, the work of this comparatively small decision-making body, spread across all states, seems never-ending. After all, the federal Government has only recently announced more troops for Iraq.

'There are new veterans being created every day,' says Mr Humphreys, with regret.

'I find it saddening to see younger people coming in, clearly quite devastatingly disabled, particularly with mental health issues as a result of their service ... We have sent more people overseas since 1999 than we sent to Malaya, Korea, Borneo and Vietnam,' he says.

New generations are appealing to the Board for help.



'We are losing, as a matter of course, our World War II veterans and their widows. The ladies tend to last longer,' he says.

War widows' pension appeals make up all the cases which members Ms D'Arcy, Mr Wood and Colonel Peter Maher hear during another half-day of sittings.

*'A moment of
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litigation.'*

Fragile old age, or distance, makes it difficult for them to appear. They rely on their advocate Cathy Every of Sydney Legacy, to give evidence on their behalf.

One widow is seeking a pension on the basis that her late husband, who joined the RAAF just after his 18th birthday and served during World War II, had PTSD. He had been diagnosed as schizophrenic before his discharge in 1946, the year after the war ended. His 2013 death certificate lists dementia as a cause of his demise.

The widow is too frail to appear and too deaf to speak on the phone, Ms Every explains. But in the yellowing archival files before the members, her past words speak for her, in a letter she wrote beseeching authorities to move her husband from a Sydney mental institution. He was unhappy there, standing for hours alone in the yard, she wrote.

The widow has also provided evidence that after her husband was released from hospital, he would never participate in war commemorations, nor watch war movies. He was a loner. They had no children and no friends.

A moment of quiet sadness fills the hearing room, which is lined with shelves of books on battles and litigation.

Ms Every and the Board members seek a link, which would satisfy the rules for a war widow's pension, between the man's service-related psychiatric condition and the dementia that played a part in his death.

Ms D'Arcy notes that his files show that he had electro convulsive treatment (ECT), a form of cerebral trauma that could have led to his dementia. The decision, as usual in the VRB, will be delivered later.

'In some cases, the husbands have been very damaged. These widows have provided a nurturing and caring environment for the husbands and the families, notwithstanding the damage that their husbands may have brought into the home,' says Mr Humphreys.

Next, a widow on speakerphone tells the tribunal in a wavering voice that her late husband, a RAAF accountant who died after contracting cerebro-vascular disease never smoked but was constantly exposed to it at work.

'The pipe to him was very distasteful,' she says.

He worked in a smoke haze in Singapore and Butterworth and back home, was subjected to passive smoking in RSL clubs.

The members must grapple with the date of onset of the disease and how that relates to smoke exposure, as well as the factors affecting him which count under veterans' legislation compensation provisions. They adjourn to seek advice from a specialist on the condition that killed him.

'It's very complex legislation that's been interpreted multiple times in the Federal Court,' Mr Humphreys explains. 'It's a jurisdiction where in operational service matters, there's a reverse criminal onus, in that we have to determine beyond reasonable doubt a medical condition is not war-caused.'

Down the corridor from the hearing room, VRB staffer Moira Brophy's job is to simplify things.

*'... there's a reverse
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'She pulls up an intricate web of information on her computer screen. It is historical detective work.'

As the conference registrar for the alternative dispute resolution trial operating in NSW since the start of this year, she checks fresh cases, acting to gather missing information so that it is as comprehensive as possible for a hearing.

She also ascertains whether some, or all of the issues can be dealt with by the parties agreeing.

Some cases may not need to go to a hearing, if a favourable decision can be done 'on the papers.'

On this day, she is working laboriously on a timeline of one veteran's smoking habits to correlate with his years of service and any stressful events he endured in that time.

The work, she explains, is about establishing 'a chain of causation.' She pulls up an intricate web of information on her computer screen. It is historical detective work. The VRB must dig deep and must then match what it finds to the intricate rules governing veterans' entitlement which have grown since Gallipoli.

As Mr Humphreys says, 'I did 20 years as a criminal lawyer at Legal Aid and I can tell you that criminal law is a walk through the park compared to this.'



Timeline for Tribunal Independence Project

Mid-May 2015	Release of draft report on Tribunal independence and appointments
4 June 2015	Draft report presented to COAT (National) conference
June/July 2015	Meeting of COAT (NSW) members to discuss report (details to be advised)
14 July 2015	Deadline for submissions on draft report
July/August	Working party considers submissions on draft report
Mid/November	Release of final report



***Dekker v Medical Board of Australia* [2014] WASCA 216**

In *Dekker*, the Western Australian Court of Appeal (Martin CJ, Newnes and Murphy JJA) considered when tribunal members may draw upon their own knowledge and experience.

Background

In 2002, Ms Dekker, a registered medical practitioner was involved in a 'near miss' motor vehicle incident. She was stopped at a T-intersection when a car began to veer towards her. To avoid being hit by the car, she drove forward and across the road. The other vehicle passed by and stopped in a ditch. Ms Dekker immediately drove to a police station that was 'one minute or so' away to report the incident.

The State Administrative Tribunal found Ms Dekker was 'guilty of ... improper conduct in a professional respect' for the purposes of s 13(1)(a) of the *Medical Act 1894* (WA) because she had left the scene to notify police without stopping to make an assessment of, and render assistance to, the occupants of the other vehicle. The Tribunal was composed of a Judge (Deputy President of the Tribunal), two medical practitioners and a fourth lay tribunal member. Section 9(c) of the *State Administrative Tribunal Act 2004* defines a 'main objective' of the Tribunal as 'to make appropriate use of the knowledge and experience of Tribunal members.' Ms Dekker appealed the decision of the Tribunal to the Court of Appeal, where the Court examined the use of the Tribunal medical members' own knowledge and experience in reaching their decision.

The decision of the Court of Appeal

The Court of Appeal stated that, depending on the particular context, 'different considerations and principles may apply' to when it is appropriate to use the knowledge and experience of the professional members of a Tribunal. The parties had erred in assuming there was 'a homogenous body of law' in this area that applied to all 'specialist tribunals' (at [50]). The Court held that, ordinarily, a breach of s 13(1)(a) requires a finding that there was a relevant 'standard or specific professional duty, generally accepted within the medical profession at the time' (at [71]). Conventionally, this would require expert evidence; however, in some cases, the Tribunal might be invited, having regard to the expertise of its members, to take notice of the fact of the obligation without the need for evidence (at [73]). The Court noted that '[a] duty not to have sexual relations with a patient might be an obligation of that kind' (at [73]). The Court held the Tribunal had failed to determine whether the duty identified was 'generally accepted' and accordingly, the standard applied was 'tantamount to a "personal opinion"', an irrelevant consideration (at [80]). Alternatively, if the Tribunal had determined the standard was generally accepted, the Tribunal failed to afford procedural fairness by relying on the knowledge and experience of its own members without having put Ms Dekker on proper notice (at [84] and [92]-[93]). The Court also remarked that it was inappropriate for non-medical members to simply rely on views of the medical members in the absence of evidence (at [90]).

***Chandra v Queensland Building and Construction Commission* [2014] QCA 335**

In *Chandra*, the Queensland Court of Appeal (McMurdo P, Lyons and North JJ) considered the content of the obligation to accord procedural fairness owed by the Queensland Civil and Administrative Tribunal (QCAT) when considering an application for leave to appeal to the Appeal Panel and to extend time for making this application.

Background

In 2005, Mr Chandra, a licensed building certifier, provided a building certificate for home renovations. In late 2008, water penetrated the house and the owners of the house lodged a complaint against Mr Chandra with the Queensland Building Service Authority (the QBSA). The QBSA commenced disciplinary proceedings in QCAT, which, on 22 November 2013, found Mr Chandra guilty of professional misconduct. QCAT ordered that QBSA never re-issue Mr Chandra's building certifier's licence and that Mr Chandra pay a financial penalty and compensation.

Under s 142(3) of the *Queensland Civil and Administrative Tribunal Act 2009*, a party can only appeal to the Appeal Panel of QCAT other than on a question of law, with leave. Under s 143, an application for leave must be filed within 28 days of QCAT providing an appellant a copy of its reasons. On 31 January 2014, Mr Chandra applied for an extension of time to appeal QCAT's decision and indicated that he sought leave to appeal QCAT's orders, other than the compensation order. In a statement of facts, Mr Chandra stated that he was informed of QCAT's decision on 17 December 2013. Mr Chandra explained that the delay arose because he was in India from 22 December 2013 and his solicitor was on holiday over the New Year period. He submitted his application should be granted as there was no prejudice to the homeowners because he was not challenging the compensation order; the delay was short (he expected to file an application on 28 January 2014); and his case was strong.

QCAT dismissed the application on 26 February 2014 without a hearing. QCAT accepted Mr Chandra's reasons for the delay from 22 December 2013 (when Mr Chandra left for India), however noted that there was no explanation of the delay between 22 November 2013 and 17 December 2013. QCAT held that, while it could not say that the Applicant's appeal had no merit, it did not have strong prospects of success and noted that the applicant should have been aware of the need for haste and that the homeowners were entitled to finality.

The decision of the Queensland Court of Appeal

Before the Court of Appeal, it was common ground that QCAT was required to afford Mr Chandra procedural fairness. The Court of Appeal held that implicit in QCAT's reasons was some assumption of fault by Mr Chandra for the delay up until 17 December 2013, and that Mr Chandra should have been afforded an opportunity to address this. The Court of Appeal also held that the comment that the application would prejudice the homeowners misapprehended Mr Chandra's case. As QCAT failed to consider a substantial and clearly articulated argument raised by a party, it had failed to afford procedural fairness. The Court thus allowed the appeal, declared that QCAT's decision to not extend time was of no effect and remitted the matter to QCAT, differently constituted, to determine Mr Chandra's application according to law.

WHITMORE

LECTURE 2015

Tuesday 19 May 2015
@ 5.30 pm

Ninth annual Whitmore lecture to be delivered by the Hon Justice Stephen Gageler on 'Whitmore and the Americans', Federal Court of Australia, Queens Square, Sydney.



Hon Justice Stephen Gageler

Thursday 4 and Friday 5 June

COAT (National) Annual Conference, 'Dreams & Realities: The Evolution of Tribunals', at the RACV Club in Melbourne. Registrations now open <http://www.coat.gov.au/events/details/16/2015-coat-national-conference.html>

Friday 28 August 2015

COAT (NSW) Annual Conference, Amora Hotel, Sydney.

New online program—*Decision making for tribunal members & judicial officers*

How does the brain make up its mind? What is the human side of legal decision-making? Find out at this limited place (16 participant) highly interactive and engaging online learning experience. Other sessions include 'Techniques for better fact finding', 'Whom do I believe?' as well as lay and expert witnesses, writing good reasons.

Who: for judicial officers and tribunal members

What: the course will help you

- Improve decision-making techniques and recognise pitfalls in the decision-making process
- Gain insight into your own psychology and its impact on decision-making
- Increase your ability to distinguish key elements of judicial decisions—make it just, legally accurate and acceptable to the parties

When: Six week course beginning 4 May to 15 June

How: Participants can access the program via desktop computer, laptop, iPad or mobile phone. Work at your own pace for 1 to 2 hours per week over a six-week course. Expert online facilitators (judicial and tribunal members) to address your questions, an easy to follow guide plus support to navigate the online program.

Cost: \$495.00 per participant. Book now to secure your place.

The online program is a partnership between the Council of Australasian Tribunals and the National Judicial College of Australia.

Committee NSW Chapter of COAT

Convenor	Anne Britton Principal Member NCAT
Vice Convenor	Malcolm Schyvens Deputy President NCAT
Secretary	Belinda Cassidy Principal Claims Assessor Motor Accident Claims Assessment & Resolution Service
Treasurer	Sian Leathem Principal Registrar AAT
Committee	Judge Greg Keating President Workers Compensation Commission Katrina Harry National Registrar, Veterans' Review Board Rodney Parsons Registrar Workers Compensation Commission Anina Johnson Deputy President Mental Health Review Tribunal Kira Raif Senior Member Migration Review Tribunal & Refugee Review Tribunal

Contact Us

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Appointments and reappointments

New appointments

- Phillip Kellow—Principal Registrar at ACT Law Courts and Tribunal
- Sian Leathem—Registrar of the Administrative Appeals Tribunal
- The Hon Acting Judge Jennifer Boland AM—Deputy President and Division Head of NCAT's Occupational Division
- The Hon Acting Judge Frank Marks—Principal Member, NCAT's Occupational Division
- Anne Britton—Principal Member, NCAT's Occupational Division

Reappointments

- Judge Greg Keating—President of the Workers Compensation Commission
- Doug Humphreys—Principal Member of the Veterans' Review Board
- Stuart Westgarth—Deputy President and Division Head of NCAT's Consumer and Commercial Division
- Mark Harrowell—Principal Member, NCAT's Consumer and Commercial Division
- Jan Redfern PSM—Principal Member, NCAT's Guardianship Division
- Christine Fougere—Principal Member, NCAT's Guardianship Division
- Yvonne Grant—Senior Member, NCAT's Occupational Division
- Susan McIlhatton—Senior Member, NCAT's Occupational Division
- Jenni Millbank—Senior Member, NCAT's Occupational Division
- Steve Bliim—General Member, NCAT's Consumer and Commercial Division
- Sonja Daly—General Member, NCAT's Consumer and Commercial Division
- Phillip French—General Member, NCAT's Consumer and Commercial Division
- William Priestly—General Member, NCAT's Consumer and Commercial Division
- Daniel Toohey—General Member, NCAT's Consumer and Commercial Division