



Administrative Decisions Tribunal

New South Wales



Annual Report
2008 - 2009

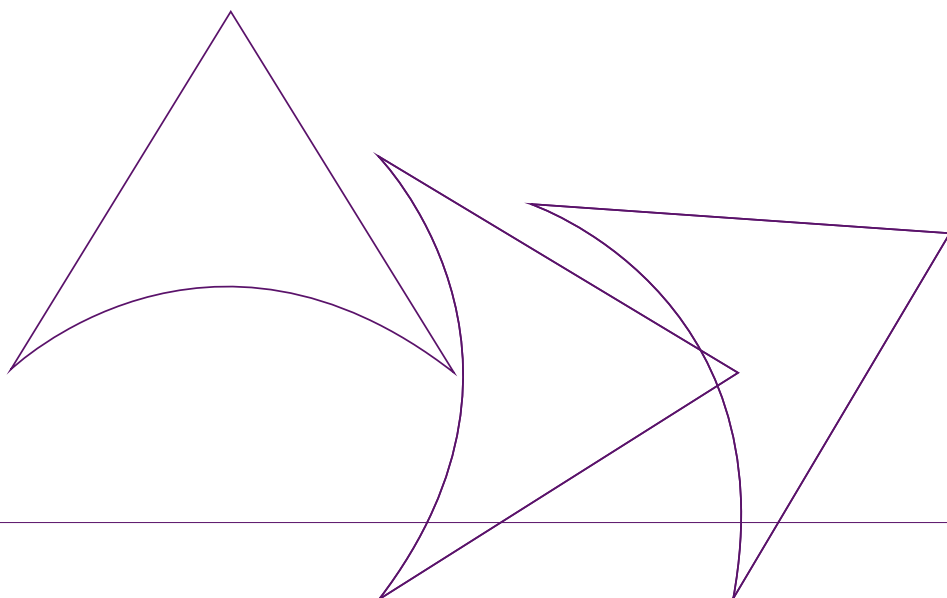


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Hon John Hatzistergos MLC
Attorney General and Minister for Justice
Parliament House
SYDNEY NSW 2000

Dear Attorney,

In accordance with section 26 of the *Administrative Decisions Tribunal Act 1997*,
I am pleased to present the eleventh annual report of the Tribunal, covering the
period 1 July 2008 to 30 June 2009.

Yours sincerely,

Judge KEVIN O'CONNOR AM
President
16 October 2009

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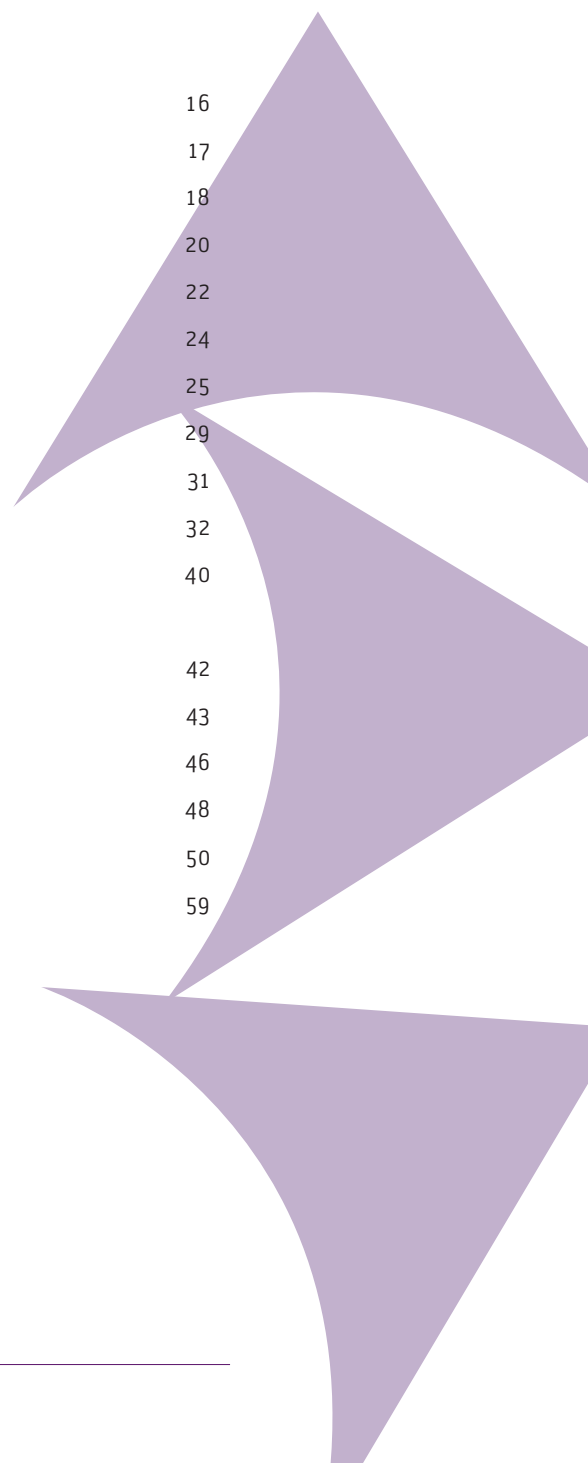


Table of Abbreviations

ADA	<i>Anti-Discrimination Act 1977</i>
ADB	Anti-Discrimination Board
ADT	Administrative Decisions Tribunal
ADT Act	<i>Administrative Decisions Tribunal Act 1997</i>
COAT	Council of Australasian Tribunals
CSD	Community Services Division
EOD	Equal Opportunity Division
FHOG	<i>First Home Owners Grant Act 2000</i>
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1989</i>
GD	General Division
HRIPA	<i>Health Records and Information Privacy Act 2002</i>
LPA	<i>Legal Profession Act 2004</i>
LSD	Legal Services Division
OPC	Office of the Protective Commissioner
OPG	Office of the Public Guardian
PPIPA	<i>Privacy and Personal Information Protection Act 1998</i>
RD	Revenue Division
RLA	<i>Retail Leases Act 1994</i>
RLD	Retail Leases Division
SCA	<i>Supreme Court Act 1970</i>

The Year in Review

Last year the Tribunal celebrated its first 10 years of operation.

In this space last year, I provided a ten-year conspectus of the work of the Tribunal and its place in the State legal system. The report contained comprehensive statistics covering the ten-year period. This report, I will concentrate on events of the last year. Statistics in the body of the report are presented with five-year comparisons.

A trend noted in last year's report has continued - a further small slowing in the disposal rate. Overall there were 1056 disposals compared to 1085 filings in the latest year (1070 versus 1096 in the previous year). The number of pending matters at year's end was 718 (693 in the previous year), the overall clearance rate per filing being 34.5 weeks (33.0 weeks in the previous year). The disposal rate improved in two Divisions (General, Legal Services), while it has slowed in the other four Divisions (most significantly, Equal Opportunity and Revenue). The Appeal Panel disposal rate has improved. Three Divisions exceeded the overall rate (Legal Services, Revenue and Equal Opportunity). Priority will be given over the next year to improving turnaround time in these Divisions.

The five major categories of work in the Tribunal remain, as previously: retail leases disputes (this year, 23% of all first instance filings); review of administrative decisions relating to occupational licences (16%); review of administrative decisions relating to State taxation (15%); review of administrative decisions (or conduct) relating to access to government information or the handling of personal information (14%); and anti-discrimination complaints (13%). The principal Division is the General Division with 33% of all first instance filings.

There were a number of amendments to the legislation governing the Tribunal's practice and procedure. The main amendment related to the

costs power of the Tribunal. The usual rule, that each party bears its own costs, is retained. The exception allowing for the making of a costs order has been recast. The Tribunal may make an order if it is 'fair' to do so. Previously, the Tribunal needed to decide whether there were special circumstances' justifying an order. More importantly, for the first time the legislation lists various types of unacceptable conduct that might attract a costs order. The amendments also introduced a leave requirement for non-lawyer representatives. This amendment responds to the difficulty presented, on occasions, by non-lawyer representatives, for example, partisans who have in the past brought cases of their own against the opposite party.

The Rule Committee structure has been simplified. There is now a peak Rule Committee only and no Sub-Committees. The complicated procedures that surrounded the notification and making of rules under the original ADT Act have been removed. The User Group structure will be expanded. The new Rule Committee has met.

So far in its history the Tribunal has eschewed detailed rules. It has relied largely on case-specific directions and the guidance given by Practice Notes. The Practice Notes have had a mix of rule-like content and general information. It is intended now to move to a clearer separation between rules and general information.

I referred in last year's overview to the derisory cap on damages in the equal opportunity jurisdiction in this State. It had remained unadjusted from \$40,000 for over 25 years! I am pleased to report that an adjustment has now been made changing it to \$100,000. This amount is, of course, still far less in value than \$40,000 was in 1983, and is below the cap recommended



Judge Kevin O'Connor AM



by the Law Reform Commission ten years ago. It remains the case that successful complainants with high economic losses will not receive an adequate remedy in damages.

One of the major components of the Tribunal's work is the review of agency determinations under the *Freedom of Information Act 1989*. It accounted for around 11% of the Tribunal's primary and appeal listings in each of the last two years. In June 2009 the Parliament enacted the *Government Information (Public Access) Act 2009*, and created the office of Information Commissioner. The legislation substantially reforms the previous law, and has been warmly commended by independent commentators. When it commences – expected to be around March 2010, it will replace the FOI Act.

The reforms seek to promote less restricted access to government information. That ought to lead to a reduction and simplification of the Tribunal's workload in this area.

I referred in the last two annual reports to the unsatisfactory level of accommodation and support for Members. Despite repeated representations, again there has been no action taken to deal with these problems. Again there has been no adjustment to the remuneration of sessional and part-time members. Rates have now been left unadjusted for five years.

Until recently, the Registry has had an entirely manual system for filing, tracking of progress and derivation of statistics. An electronic information system developed ten years ago for the State Industrial Relations Commission has now been adapted for use by the Registry.

During the year we lost some of our key part-time members to higher appointments.

In September 2008 eminent barrister, Robert Macfarlan QC, became a Judge of Appeal of the Supreme Court. He had served for many years as a part-time member of the Legal Services Division and its predecessor jurisdiction.

In June 2009 the Commonwealth government announced its decision to appoint one of our part-time Deputy Presidents, Robin Handley, as a full-time Deputy President of the Commonwealth Administrative Appeals Tribunal, a capacity in which Mr Handley had previously served between 1998 and 2003. Two months later (as this report was being prepared), there was a further announcement, that another of our part-time Deputy Presidents, Anne Britton (Divisional Head, CSD) was to be appointed as a full-time Senior Member of the AAT. In addition, in June 2009 the State government announced its decision to appoint one of our part-time judicial members, Linda Pearson, as a full-time Commissioner of the Land and Environment Court.

All of these members gave distinguished service to the ADT.

In recent years, Deputy Presidents Handley and Britton undertook much of the demanding work of the Tribunal, both at Divisional level and in the Appeal Panel. They carried out their roles with great competence and élan. They will be specially missed.



Judge Kevin O'Connor AM
President

Our Objectives

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.

Access, Assistance, Support and Resources

The Tribunal is committed to providing a forum accessible to all users. This includes a commitment to ensuring that proceedings are fair, informal, efficient and effective.

Location and Facilities

The Tribunal is located centrally, at Level 15, St James Centre, 111 Elizabeth St, Sydney.

There are four hearing rooms. Two have a relatively traditional courtroom layout, but with all benches and tables at the same level. Two have a round-table design. The more traditional design is used for proceedings in the nature of trials and for Appeal Panel hearings. The other two rooms are mainly used for merits review hearings. There are three small rooms where planning meetings, case conferences and mediations are held, without transcript.

The Tribunal has very limited facilities to accommodate members outside the hearing rooms on the days they sit, or to enable part-time members to undertake research and work on their decisions on-site. A number of representations have been made to the Attorney General's Department, to no avail, requesting an improvement in member accommodation and secretarial assistance.

Remote Users and Regional Access

The Tribunal seeks to be accessible to remote users by offering the following options (where appropriate):

- telephone conferencing;
- video links; and
- conducting sittings in regional locations

While the Tribunal does not keep specific statistics, it estimates that a telephone link is used by at least one party in about one-third of the business of the Tribunal at the directions and interlocutory stages. Often both parties are contacted by telephone. Suburban and country residents and legal practitioners welcome this facility.

The Tribunal rarely uses video links.

Where an applicant requests it, and it is justified, the Tribunal will sit at a location outside Sydney. In the last year the Divisions of the Tribunal sat at more than 20 locations in regional New South Wales. The usual venue for remote sittings is at the local courthouse.



Access by persons with disabilities

Access by people with disabilities is aided by:

- ramp access via St James Arcade for persons with mobility disabilities;
- lifts in St James Centre equipped with braille lift buttons and voice announcements indicating the floors;
- waiting area and tribunal hearing rooms designed to optimise accessibility;
- telephone typewriter (TTY);
- Infra-Red Listening System (Hearing Loop); and
- Auslan interpreters.



Access to Tribunal Information, Tribunal Proceedings and Tribunal Decisions

The Tribunal's website is located at www.lawlink.nsw.gov.au/adt. The site has links to ADT legislation and rules, daily law lists and published decisions. It also provides information about each Division, (Practice Notes, standard forms and brochures) and electronic versions of the Annual Report.

The Tribunal, being a judicial body, sits and hears most cases in public. All hearings are notified in the newspaper and are open to the public unless special orders are made to close them.



Most hearings are conducted without restriction. The Annual Report for the year ending 30 June 2006, under the heading 'Open Justice' gave a brief outline of the Tribunal's practice in relation to anonymisation of the identity of parties or witnesses, and material that is suppressed either by statute or specific order.

The Tribunal's policy is to publish to the Internet all reserved decisions and selected oral decisions. In this way the rulings of the Tribunal can be disseminated widely, promoting a good understanding of the Tribunal's approach.

In the reporting year, the Tribunal published a total of 425 decisions with the following break-up: Appeal Panel, 92 (Internal 78, External 14); General Division, 160; Equal Opportunity Division, 50; Revenue Division, 38; Legal Services Division, 38; Retail Leases Division, 31; and Community Services Division, 16.

Decisions are published first on the Attorney General's Department Caselaw NSW website (http://www.lawlink.nsw.gov.au/lawlink/caselaw/11_caselaw.nsf/pages/cl_adt). The aim is to load the decisions on the day of delivery or soon after. Decisions may also be located on the main Australia-wide service covering decisions of courts and tribunals, AUSTLII (Australasian Legal Information Institute)(www.austlii.edu.au). A number of specialist reporting services also publish Tribunal decisions in their areas of specialty.



Pauline Green
Registrar

Registry

The Registry has eleven positions, including the Registrar and Deputy Registrar. 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.

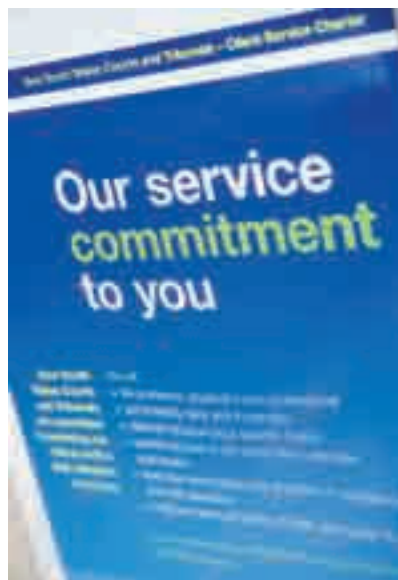
The Registry provides the following services: enquiries, registrations, hearing support, case management and general administrative support to members. In addition, registry staff maintain the Tribunal's website, ensuring that information about the Tribunal's jurisdiction and procedures are up-to-date and readily available to the public. An improved information management system commenced on 1 July 2009.

Staff development

Staff receive training through the Attorney General's Department, 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 that 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 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 2004*. Appendix A provides a summary financial statement for the Tribunal in the reporting period. The Attorney General's Department annual report will also include a budget report.



Membership

As at 30 June 2009, the Tribunal had 104 members divided as follows: 52 judicial members (including for this purpose, presidential members) and 52 non-judicial members. The overall gender division was also equal. There were 27 female judicial members and 25 male judicial members; and the reverse numbers in the case of non-judicial members.

The Tribunal has 10 presidential members made up of the President, a full-time Deputy President and eight part-time Deputy Presidents. One of the part-time Deputy Presidents is engaged on a fractional full-time sessional basis (0.5 of a week). One of the judicial members is engaged on a fractional full-time sessional basis (0.8 of a week).

The size of the membership is a function of the multi-jurisdictional character of the Tribunal, reinforced by legislative requirements which seek to ensure that specialist expertise and community representatives have a significant role in the conduct of particular jurisdictions.

Operationally, much of the work of the Tribunal is discharged by a core group of members. On the judicial member side in the last year, apart from the President and the full-time Deputy President (Magistrate Hennessy), the key members have been Deputy Presidents Britton, Chesterman and Handley, and Judicial Members Higgins, Montgomery, Molony, Molloy and Pearson. On the non-judicial member side, Members Bolt, Blake, Bennett and Antonios have made a significant contribution.

Many of the specialist members (for example, non-judicial members who belong to the veterinary discipline list, the education appeals list or the public health list) are only called upon if a case of that kind is filed in the Tribunal. Consequently there are many members, especially on the non-judicial member side, who will rarely sit if the jurisdiction is not a busy one. The Tribunal has, with the co-operation of the Minister, sought to reduce the overall number of

members on the books of the Tribunal from the peak of 147 reached four years ago. This eases management pressure for the Registry and for the appointment and renewal process. It also assists in ensuring a reasonable degree of repeat work for the members assigned to the busy jurisdictions of the Tribunal, with a consequent benefit in quality of output, and morale.



*Ms Sigrig Higgins
Judicial Member*

There were two new members appointed during the year, both judicial members. Six members resigned prior to the expiry of their term, and another 10 members retired following expiry of their term. In the instance of some of the latter number, the expiry was a result simply of adoption of the policy that non-judicial members should ordinarily not be renewed after three successive terms (i.e. 9 years). As at year's end, there were three further resignations due to take effect early in the next reporting year.

Recruitment: In March 2009 the Attorney General advertised for expressions of interest for appointment of solicitor members to the Legal Services Division. There were 68 expressions of interest. A panel comprising the Tribunal's President, the Law Society President



Mr Stephen Montgomery, Judicial Member

(Mr J Catanzariti), Ms L Sanderson (Deputy Director General (General Counsel), NSW Department of Premier and Cabinet) and Dr M Varady AO (Adjunct Professor, University of New South Wales, and former Principal, Sydney Girls High School) assessed the expressions of interest, and conducted interviews. Recommendations were made to the Minister in June 2009.

Professional Development

The major collegiate event for the Tribunal is the annual members' conference. It was held on Friday 14 November 2008 at the Australian Museum, the theme being 'ADT: Tenth Anniversary'.

The Attorney General spoke, and commended the Tribunal on its work over the ten years. The keynote address was given by the new President of the Court of Appeal, Justice James Allsop. Justice Allsop's topic was 'Modern Approaches to



The Hon Justice James Allsop, President, Court of Appeal



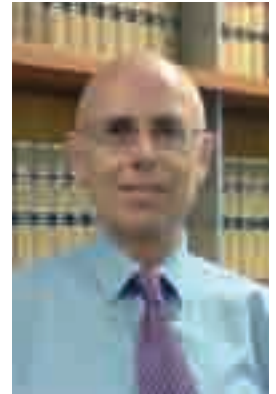
The President with Mark Robinson and Robin Creyke

Litigation: the Work of Administrative Tribunals'.

The role and work of the ADT was the subject of the main morning session presented by leading Australian administrative lawyers, Professor Robin Creyke, of the Australian National University, and Mark Robinson, barrister and editor of the NSW Administrative Law Service.

There were two Members Update sessions, one outlining amendments to the ADT Act, and the other explaining improvements in the availability of the Department's on-line library services for part-time members working from their offices.

Judge Graham Anderson, from Victoria, led a vibrant discussion session on the Way We Relate, examining the way judges deal with those who appear before them. He used as the reference point for the discussion filmed excerpts of his own interactions - 'good' and 'not-so-good' - with practitioners at directions hearings.



Judge Graham Anderson

A former part-time member of the Tribunal, barrister Chrissa Loukas, gave a very interesting and well-illustrated presentation on the operation of the International Criminal Tribunal for the Former Yugoslavia, located at The Hague. She was a Defence Counsel there from 2003-2006.



Chrissa Loukas

Given that most members are part-time and some need rarely to be called up, and given the limited budget of the Tribunal, continuing professional development activity is limited. The Tribunal has an induction kit, and holds induction sessions for new members. Divisional members' meetings are held regularly for Equal Opportunity and Revenue Division members, and less so in the other Divisions.

Visitors

Visitors to the Tribunal during the year included: in December 2008, Professor John Angel, Head of the United Kingdom Information Tribunal; and in February 2009, a delegation of judges from the Supreme People's Court of China. Delegations of Chinese judges have visited the Tribunal on a number of occasions over the years, usually as part of Human Rights Technical Cooperation programs managed by the Australian Human Rights Commission.

Council of Australasian Tribunals

The President was elected convenor of the NSW Chapter of COAT in September 2007, and in that capacity he is a member of the National Executive of COAT. Deputy President Hennessy is a member of the Chapter Committee. COAT seeks to provide education, assistance and support to members of Tribunals, and a forum for discussion of issues affecting Tribunals and Tribunal members.

International

The President, Judge O'Connor, was Australia's inaugural Federal Privacy Commissioner from 1989 to 1996 and is presently a part-time Commissioner of the NSW Law Reform Commission assigned to its Privacy Reference.

In October 2008 he participated in two official events in France related to privacy and data protection.

The first was the 30th International Data Protection and Privacy Commissioners Annual Conference held from 14-17 October at the Congress Hall of the Council of Europe in Strasbourg, France.

In his capacity as alternate Chairperson, he also attended the 72nd session of the Commission for Control of Interpol's Files (CCF). The meeting was held on 30 and 31 October at Interpol Headquarters in Lyon, France. The CCF has three principal roles: to monitor the application of Interpol's data protection rules to personal data

processed by Interpol; to provide advice to Interpol with regard to any operations or projects concerning the processing of personal data; and to process requests for access and correction of Interpol's files.

Tributes

During the year a number of members who had given long and distinguished service to the Tribunal over many years retired or resigned.

Many of these members were very active contributors to the work of the jurisdictions in which they sat, and several had served for many years extending back to the years prior to the absorption of the jurisdictions into this Tribunal.

The retiring non-judicial members were: Annette O'Neill (who was assigned to the GD, LSD and RLD), Lynn Houlahan (GPE List, EOD, CSD); Dr Michael Costigan and Dr Barrie Dyster (LSD); Laura Mooney, Louise Nemeth de Bikal, Henry Pan and Anthony Schembri (EOD); and Meredith Martin (CSD).

The following judicial members retired: Her Honour Acting Judge Angela Karpin (LSD), whose service was acknowledged in last year's annual report; Professor Larissa Behrendt (EOD); Graham Ireland (EOD); and Julie Greenwood (LSD and Rev D).

There were several resignations during the year, some of which have been noted in the President's Year in Review. The usual reason for resignation was the taking up of an appointment that made it inappropriate or impractical to remain a member of this Tribunal.

The following non-judicial members resigned: Veterinary Practitioner Member, Dr Ruth Thompson; Anne Whaite (GPE List); Alan Kirkland (EOD); and Roger Fairweather (RLD).

The following judicial members resigned: Deputy Presidents Handley and Britton, Judicial Member Pearson, Barrister Member Macfarlan QC (as noted in the President's Year in Review); Deputy President John Steele QC (GD); and Solicitor Member Cedric Vass (LSD).

The Divisions and the Appeal Panel



From left: Deputy Presidents Wayne Haylen, Anne Britton, President Kevin O'Connor, Deputy Presidents Michael Chesterman, Nancy Hennessy (Deputy President Jane Needham unable to be present)

The ADT Act segregates the matters heard by the Tribunal into two categories:

- applications for review of *reviewable decisions*; and
- applications for *original decisions*.

The first category refers to the review of a government administrative decision that has been declared by Parliament through an enactment to be reviewable by the Tribunal.

The second category is less exact in its coverage. It covers any application to the Tribunal for relief in respect of a jurisdiction vested in the Tribunal where there has been no prior binding legal decision relating to the matter in dispute. The second category's description is based merely on the fact that the Tribunal is called on to make the first or 'original' decision in the matter.

The ADT Act establishes six Divisions and an Appeal Panel.

The Divisions

Of the six Divisions, three have as their principal or only business the 'review of reviewable decisions' (General Division, Revenue Division and Community Services Division).

Three Divisions have as their only or principal business the making of 'original decisions' (the

Equal Opportunity Division, the Retail Leases Division and the Legal Services Division). Some of the professional discipline work of the Tribunal falls into the 'review' category – cases where a professional practitioner is appealing against a decision of an internal professional body vested with the power to make disciplinary orders.

The LSD's functions belong to the field of public law (like merits review decisions). In contrast, the work of the EOD and RLD might be seen as belonging to the field of private law, in that they seek to resolve private disputes.

It may be conceptually more helpful to group the Divisions of the Tribunal into those performing primarily administrative or public law functions and those performing primarily civil or private law functions. (In some similar multi-jurisdictional tribunals, e.g. the Victorian Civil and Administrative Tribunal, the equivalent of the EOD is placed in a 'human rights' stream as distinct from the 'administrative' and 'civil' streams.)

ADMINISTRATIVE OR PUBLIC LAW DIVISIONS

- **General Division:** operative 6 October 1998. Hears most applications by citizens for the review of administrative decisions or administrative conduct. Disciplinary matters (whether original applications or review applications) not involving lawyers are located in this Division.
- **Community Services Division:** operative 1 January 1999. Hears applications for review of various administrative decisions made in the Community Services and Ageing, Disability and Home Care portfolios and applications for original decisions for exemption from prohibition on being engaged in child-related employment.

- **Revenue Division:** operative 1 July 2001. Hears applications for review of various State taxation decisions.
- **Legal Services Division:** operative 6 October 1998. Hears disciplinary complaints against legal practitioners and licensed conveyancers.

CIVIL OR PRIVATE LAW DIVISIONS

- **Equal Opportunity Division:** operative 6 October 1998. Hears complaints of unlawful discrimination, harassment and vilification.
- **Retail Leases Division:** operative 1 March 1999. Hears claims by parties to retail shop leases.

The Appeal Panel

The Appeal Panel may hear internal appeals from decisions of a Division of the Tribunal. It may also hear external appeals from the tribunals and courts involved in guardianship decision-making.

Most Divisional decisions are appealable to the Appeal Panel. An Appeal Panel decision is appealable to the Supreme Court's Court of Appeal on a question of law.

As a result of amendments that took effect on 1 January 2009 affecting appeals from the Appeal Panel and referrals of questions of law, all Appeal Panel decisions are assigned to the Court of Appeal regardless of whether the presiding member was a judge (the old criterion). The Court of Appeal has the power to remove the proceedings to a Division of the Supreme Court (in effect, a single judge) or have the matter dealt with by a two member Court of Appeal bench, instead of the usual three member bench.

The Appeal Panel also has the power to refer a question of law to the Supreme Court for determination.

In the case of LSD decisions, there is no right of appeal to the Appeal Panel. The right of appeal is direct to the Court of Appeal. The grounds of appeal are unconfined. Similarly, there is no appeal to the Appeal Panel in other professional discipline jurisdictions of the Tribunal. The appeal is to be made direct to the Supreme Court and is confined to a question of law and with the leave of the Court may extend to a review of the merits. See Veterinary Practice Act, s 91C, Surveying Act, s 32C, Architects Act, s 58C and Building Professionals Act, s 44C.

Moreover, it is open to any party to proceedings aggrieved by decisions of Divisions of the Tribunal or of the bodies whose decisions may be the subject of an external appeal to bypass the Appeal Panel and instead apply to the Supreme Court for judicial review.

The General Division

The President is, in addition, the Divisional Head of this Division.

Case Load

There were 357 new applications filed in the reporting year. This number represents 36% of the Tribunal's first instance filings for the year, as compared to 39% last year.

The Division has two major streams of business.

The main stream relates to licences, usually occupational, with 178 filings (i.e. 49% of the Division's business). The key categories were: Transport licences, 74, mainly taxi cab driver authority cases; Commissioner of Police licences, 60, predominantly security guard licences (33) and firearms licences (25); and various Fair Trading licences, principally home building licences (16) and property, stock and business agent licences (11).

The other stream of business relates to information rights, with 149 filings (i.e. 41% of the Division's business) – 104 under the FOI Act, 33 under PPIPA and 12 under HRIPA.

The remaining business of some volume comprises applications for review of decisions of the Public Guardian or the Protective Commissioner, 17 filings (5%). These cases are heard by members assigned to the Guardianship and Protected Estates List.

Case Management

The directions list is the first hearing point for all the Occupational Regulation filings and miscellaneous other filings. Information Law filings have a different case management process – planning meetings. Guardianship and Protected Estates matters are listed initially for separate, confidential directions hearings usually on the same day as the main directions list.

Timeliness

The disposal rate improved slightly as against last year, now 33 weeks as against 34 weeks. It remains above the historical average.

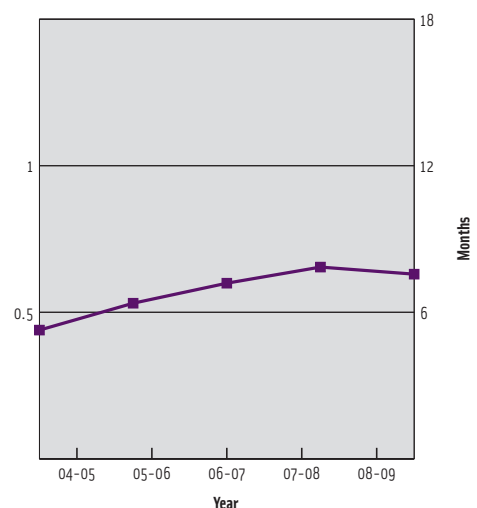
Legislative Developments

As noted in the Year in Review, in June 2009 the Parliament enacted the *Government Information (Public Access) Act 2009*, and created the office of Information Commissioner.

Exemption categories have been narrowed and simplified. The decision-making system retains the pattern of the previous law – original agency decision, decision on internal review, with the access applicant having the right to apply for further review by the Information Commissioner (previously, the Ombudsman) and, as an alternative or in addition, review by this Tribunal. The legislation also deals systematically with the way any public interest discretion is to be applied. It specifies clearly what laws are to be regarded as overriding secrecy laws.

As noted in the Year in Review, these reforms ought to lead to a reduction and simplification of the Tribunal's workload in this area.

General Division - Average Disposal Time



Guardianship and Protected Estates List

The Tribunal has jurisdiction to hear appeals from the Guardianship Tribunal, the Mental Health Review Tribunal and the Local Court against the making or refusal to make guardianship and financial management orders. These appeals are known as external appeals because they are appeals from bodies other than this Tribunal. The Tribunal also has jurisdiction to review decisions made by the Public Guardian and the Protective Commissioner when administering those orders. The external appeals and the review decisions form the Guardianship and Protected Estates List. Members with specialist expertise in this area conduct the hearings.

Deputy President Hennessy manages the Guardianship and Protected Estates List.

External Appeals

As at 30 June 2008, there were 6 external appeals pending. During the year 20 appeals were lodged, 19 from decisions of the Guardianship Tribunal and one from a decision of the Mental Health Review Tribunal. Twenty-two appeals were finalised. In eight cases the appeal was upheld either in part or in full. In five cases the appeal was dismissed and in nine cases the appeal was withdrawn. Four appeals remained pending at the end of the year.

The time standards for appeals is 80% to be finalised in 6 months and 100% in 12 months. These standards were almost met this year with (73%) of the 22 appeals disposed of in under six months and 95% finalised in less than 12 months. One matter took over a year to finalise.

Review Decisions

As at 30 June 2008, there were 11 review applications pending. During the year a further 17 applications were lodged and 22 were finalised leaving 6 review applications pending at the end of the year. Of the seventeen new applications for review, 9 related to decisions of the Protective Commissioner and 8 related to

decisions of the Public Guardian. Of the 22 applications that were finalised, the administrator's decision was affirmed in 4 cases and set aside, varied or remitted in 6 cases. Twelve applications were withdrawn, settled or dismissed.

Significant Cases

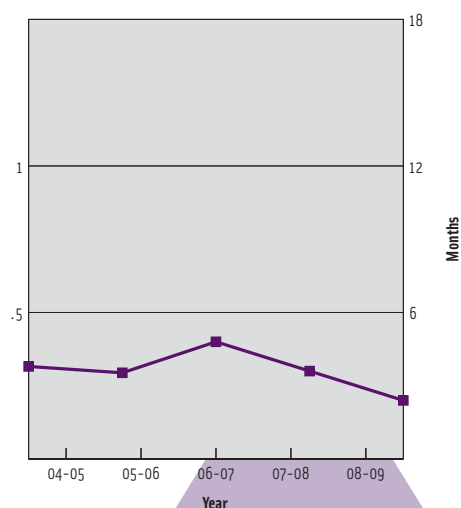
In HH v HI and Protective Commissioner [2009]

NSWADTAP 41 the Appeal Panel decided that the

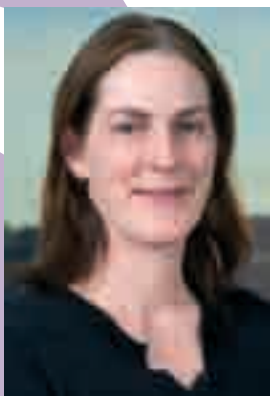
Guardianship Tribunal has jurisdiction to make a guardianship order which would allow a guardian to make decisions, take action and give consent in relation to matters involving religious observance as long as that was considered necessary for the welfare or benefit of the person. That issue had never been squarely addressed by the Appeal Panel or the superior courts before.

In FI v Public Guardian [2008] NSWADT 263 the Tribunal dealt with an application by a mother contesting a decision of the Public Guardian not to develop an advance care plan for her daughter, a protected person, which allowed for withdrawal of life support in certain circumstances. The Public Guardian's refusal derived from an earlier decision of this Tribunal suggesting that the Guardianship Act did not confer such a power, a view with which the Guardianship Tribunal had subsequently disagreed. The Tribunal ruled that the inclusion in a palliative care plan of an element providing for the withdrawal of treatment in certain circumstances is not unlawful, if entered into in the proper exercise of the functions vested in the Public Guardian.

External Appeals - Average Disposal Time



Revenue Division



Deputy President
Jane Needham SC

The Divisional Head is part-time Deputy President, Ms Jane Needham SC.

State tax law gives taxpayers the right to apply for review of decisions made by the Chief Commissioner, State Revenue on objections to assessment. However, unlike the situation in most merits review matters where there is no onus of proof, the applicant in Revenue Division matters bears the onus of proving his or her case.

The Tribunal's jurisdiction is concurrent with the Supreme Court. It is usual for taxpayers with lower-amount disputes to bring their case to the Tribunal rather than the Supreme Court. Jurisdiction in relation to the majority of revenue type statutes is conferred by s 96 of the *Taxation Administration Act* 1996. Jurisdiction under the *First Home Owner Grant Act* 2000 is conferred directly by that statute.

Case Load

The Division became busier in 2008-9, having 161 filings. Unfortunately, disposals did not keep pace, with 126 matters being disposed of during the year. The increased filings and general length of time for clearing matters means that at 30 June 2009 there were 126 matters on hand. Included among these is a bloc of 15 filings which all form part of the one overall dispute.

Some of those matters were complex matters which have had a long and involved history, and they have been listed for hearing in late 2009 and should be disposed of in the near future.

As to the break-up of applications filed in 2007-2008, the following shifts are noted. The main business of the Division has become applications under the *Land Tax Management Act*, with an increase in filings from 60 in 2007-8 to 83.

The downward trend in filings under the *First Home Owner Grant Act* continued, with filings down from 30 to 23.

A breakdown of the various Acts under which applications for review were filed in 2008-9 is as follows:-

Duties Act 1997	10
First Home Owners Grant Act	23
Land Tax Act	5
Land Tax Management Act 1956	83
Parking Space Levy Act 1992	2
Payroll Tax Act 1971	31
Payroll Tax Act 2007	1
Taxation Administration Act 1996	6

Timeliness

Analysis of the various outcomes of matters disposed of in 2008/9 shows that of the 126 disposals, 89 did not go to hearing either because the application was withdrawn or dismissed, there was no appearance or the parties reached agreement. Of the remaining 37 resolved cases, the decision under review was affirmed in 31 cases. The decision was set aside, varied or remitted in 2, and a mixed result recorded in 3 cases. There was one case in which it was found there was no jurisdiction.

Of the 126 disposals, 35 were disposed of in six months. Eighty-seven were completed of in under 12 months.

On its face, the length of time taken to dispose of matters in the Division is unsatisfactory. However, it can be seen that a large percentage of matters filed are either disposed of by agreement or are not proceeded with. While there is no procedure for mediation of disputes, the practice in the Directions List is to allow adjournments where there is a reasonable possibility of resolution and for a lengthy period – say 2-3 months – for remissions pursuant to s 65 of the ADT Act if the decision-maker is prepared to reconsider the decision once the

material from the applicant has been received. While this does extend the time taken to dispose of matters, it often results in a consensus between the parties as to the outcome of the matter.

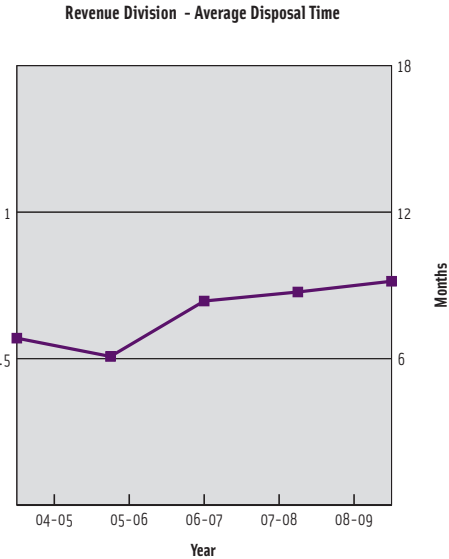
Practice and Procedure

As a result of consultation by the Head of Division with the President, the Registrar, and some of the stakeholders in the work of the Division, an Information Sheet (in lieu of a Practice Note) has been developed for the Directions List. The Information Sheet sets out the listing procedures and provides information, particularly for persons representing themselves before the Tribunal, on the usual timetables and directions which can be expected to be made.

In 2009-10 a running list for simple matters (particularly First Home Owner and Land Tax principal place of residence matters) will be trialled to seek to reduce the time for disposal of these matters.

Membership

All of the members of the Division are part-time Members of the Tribunal and their commitment and experience is very much appreciated.



Community Services Division



Deputy President
Anne Britton

The Divisional Head is part-time Deputy President Ms Anne Britton.

Structure and Functions

The Division has both a merits review and original decision-making function.

The Division reviews decisions made by both government and non-government agencies. 2008-09 has seen a steady increase in the number of applications involving decisions made by the latter.

The majority of decisions reviewed by the Division concern the removal of children from authorised carers. Generally applications for review of these decisions are accompanied by an application to stay the removal of the children. These matters are listed at short notice and a guardian is appointed to represent the child/ren. *The Children and Young Persons (Care and Protection) Act 1998* (Care and Protection Act) directs the Tribunal to give paramount consideration to the safety, welfare and well-being of the children.

The Division makes original decisions in applications made under the *Commission for Children and Young People Act 1998* (CCYP Act). Under that Act, a 'prohibited person', that is, a person convicted of certain sex offences or offences involving the use of violence against a child, must apply for an exemption if they wish to undertake, or continue in, child-related employment. Unless the application is granted, it will be an offence for the prohibited person to work in, apply for or remain in child-related employment, including voluntary employment. The Act requires the Tribunal to be satisfied that the prohibited person does not pose a risk to the safety of children before granting an application.

Decisions covered by the Community Services Division include decisions to:

- *remove a child or young person from an authorised carer (foster carer);*
- *authorise or not to authorise a person to be an authorised carer;*
- *provide financial assistance to a body that does not conform to the objects and principles of the Disability Services Act;*
- *accredit or refuse to accredit adoption service providers;*
- *fail to provide information or assistance under the Adoption Act;*
- *de-register a family day care carer;*
- *grant or refuse to grant a licence to operate a children's service, such as a childcare centre, and*
- *refuse to implement recommendations made by the Ombudsman.*

A panel of three members determines most matters that come before the Division. A judicial member sitting alone determines applications brought under the Commission for Children and Young People Act and, where appropriate, applications for interlocutory orders.

The Division's non-judicial members come from across the spectrum of the community sector, and have expertise in diverse areas including psychology, mental health, children's and disability services. Many hold appointments to the Guardianship and Mental Health Review Tribunals and bring with them significant tribunal experience.

Case Load

The number of applications increased this year compared to last – applications for review of reviewable decisions have increased by a third,

to 30, while applications filed under the CCYP Act remain static.

Mediation is increasingly used to resolve disputes involving authorised carers. Of the five matters referred to mediation, all settled.

About 90 per cent of applications filed during the year were finalised in less than six months.

Because of the pressing need to conclude applications involving a decision to remove a child, oral reasons are generally delivered at the conclusion of the proceedings. Accordingly, the Tribunal's website contains few reported decisions.

Appeals

Parties have a right of appeal to an Appeal Panel of the Tribunal, except in relation to decisions made under the CCYP Act, where an appeal only lies to the Supreme Court. This year no appeals were lodged against decisions of the Division.

Case examples

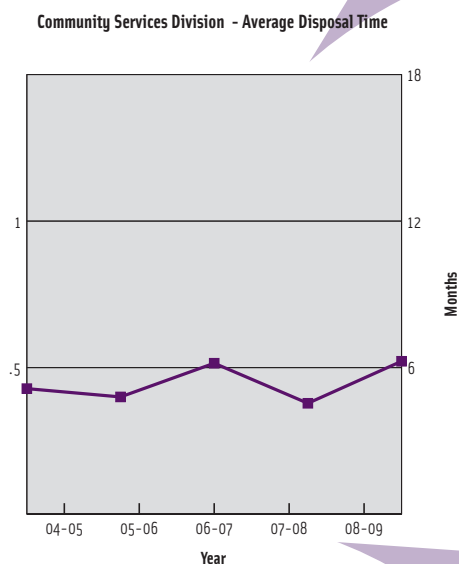
MA, a 24 year old woman, had been convicted of the offence of 'detain for advantage in company inflicting actual bodily harm' and as a consequence, it was unlawful for her to work in 'child-related employment'. She applied to the Tribunal under the CCYP Act so that she could pursue her chosen career – an area of child related employment. The Tribunal found that MA no longer posed a risk to the safety of children and granted the application. The Tribunal noted that the index offence, while serious in nature, had been committed when MA was an immature teenager; she had received treatment and made conscientious efforts to rehabilitate herself; and the expert opinion was that she did not pose a risk even to the most vulnerable children. (*MA v Commission for Children and Young People* [2009] NSWADT 167.)

In *AX & AY v Wesley Dalmar and ors* [2008] NSWADT 231, the Tribunal made a costs order against Wesley Dalmar, a designated agency

charged with supervising the out-of-home-care of a 12-year-old boy with severe developmental delay. The substantive application concerned a decision to remove the boy from the applicants with whom he had lived for most of his life. The proceedings became protracted and the applicants ultimately withdrew their application.

The Tribunal found that Wesley Dalmar failed to comply with some of its obligations under the ADT Act, in that it did not notify the applicants in writing of the decision to remove the boy or their right to have that decision reviewed or, lodge all documents relevant to that decision within the period prescribed by the Act.

The Tribunal found that while Wesley Dalmar's conduct was neither deliberate nor negligent it had caused the applicants to incur additional costs and ordered that it pay half the applicants' costs.



Legal Services Division



*Deputy president, the
Honourable Justice
Wayne Haylen*

The Divisional Head is the Hon Justice Wayne Haylen of the Industrial Court of New South Wales.

Structure and functions

The Division hears applications for disciplinary orders from the Law Society, the Bar Council or the Legal Services Commissioner in relation to alleged misconduct by legal practitioners. The Division may also deal with client claims for compensation arising from misconduct. It also

considers practitioner applications allowing employment of persons convicted of a serious offence. The Division, in the past, dealt with disciplinary applications relating to licensed conveyancers. That function has now been transferred by legislation to the General Division. In addition, practitioners may apply to the Tribunal for review of disciplinary orders made by the Law Society or the Bar Council under the (lower tier) disciplinary powers vested in them by the legislation.

Divisional decisions are not appealable to the Appeal Panel. The right of appeal is direct to the Court of Appeal.

Case Load

During the year, 31 applications were filed in the Division and 49 applications were finalised. There were 33 applications pending. While there are a significant number of applications still pending in the Division, this is a marked improvement on the previous year when there were 51 applications pending, a trend that had been developing over the two years prior to 2008. In last year's Report it was stated aim within the next 12 months to reduce the pending business to less than 40 and with 33 pending cases at the end of June 2009, it is satisfying to be able to report that goal has been achieved.

Nevertheless, considerable work is required to further reduce the number of pending applications and to efficiently dispose of the cases that come into the list during the next 12 months. To achieve a better through-put of cases requires not only effort from the members of the Division but the co-operation of the parties, especially in the timely filing of Responses and avoiding numerous adjournments in order to file evidence.

During the year three applications for disciplinary orders were dismissed while 12 practitioners were fined, 17 were reprimanded, one practising certificate was suspended and six practising certificates were cancelled. In all, 20 practitioners were removed from the roll and there were four consent orders with eight matters involving conditions being imposed on practising certificates. In seven matters there were undertakings to complete courses of further legal education. One application was granted leave to be withdrawn. In relation to matters of review, one application was withdrawn/dismissed and one application for review was affirmed. A wide variety of conduct led practitioners to be struck off or in having their practising certificate cancelled.

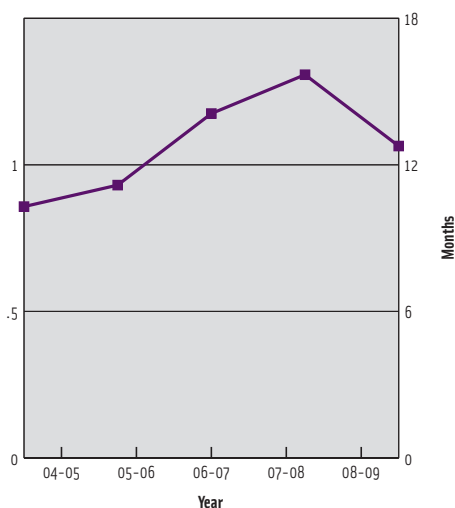
Legislation

In November 2008 the ADT Act was amended in relation to the composition of the Legal Services Division. Among the changes introduced included the Minister's power to make an assignment to the LSD of at least one Deputy President other than a Divisional Head and at least one Presidential judicial member who is a current, retired or acting eligible judicial officer. This amendment was designed to allow the Division to be more broadly constituted and to ensure that members with the required qualifications are available in sufficient numbers to meet the case list. The previous reference to a judicial member who was a Judge of the District Court or the Supreme Court has

Other Professional Discipline Jurisdictions

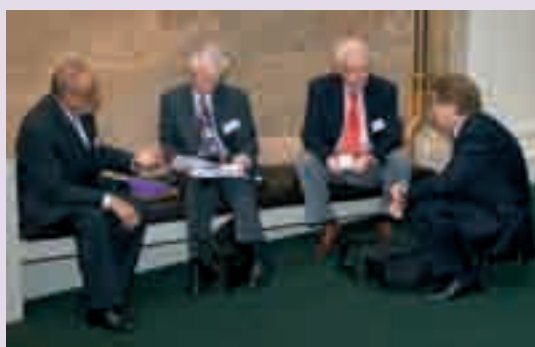
been replaced by reference to a “senior judicial member”. The term “senior judicial member” is defined to mean the Divisional Head, a Deputy President assigned to the Division and a non-presidential judicial member who is a current, retired or acting eligible judicial officer. In turn, an eligible judicial officer is defined to mean a Judge of the Supreme Court, a Judge of the District Court or a judicial officer of any other court or tribunal having an equivalent status to the Supreme Court or District Court.

Legal Services Division – Average Disposal Time



The Tribunal has professional discipline jurisdiction affecting registered architects, registered surveyors, veterinary practitioners, licensed conveyancers and accredited certifiers. During the year there were 3 new filings affecting accredited certifiers (under the Building Professionals Act) and 1 affecting a licensed conveyancer (the Conveyancers Licensing Act).

The decline in filings in the Tribunal in relation to accredited certifiers is influenced by the new legislative structure, under which the Building Professionals Board can be the trial level for all professional discipline proceedings brought against accredited certifiers. It is expected that in future the Tribunal will be less involved in conducting original disciplinary proceeding, its main involvement being to hear applications for review of decisions by the Board in original proceedings.



Equal Opportunity Division

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

Structure and Function

The Division exercises jurisdiction conferred by the *Anti-Discrimination Act 1977* ('AD Act').

The Division hears and determines matters falling into the following five categories:

1. complaints that have been referred to it by the President of the Anti-Discrimination Board (ADB);
2. applications for leave to proceed when a complaint has been declined by the President of the ADB;
3. applications for the registration of conciliation agreements made at the ADB;
4. applications for interim orders; and
5. review of decisions made by the President of the ADB in relation to applications for exemption from the AD Act.

There were 100 matters pending at the beginning of the year. Of the 140 new applications filed during the year, 107 (77%) belonged to the first category, 27 (19%) to the second category, 2 (1%) to the third category and 4 (3%) to the fourth. There were no applications in the fifth category. The Division finalised 115 matters, 25 fewer than it received, leaving 125 applications pending at the end of the year.

Membership

A panel of three sits on most hearings – one judicial member and two non-judicial members who have expertise in various areas of anti-discrimination law and practice. For some kinds of preliminary and interim applications, the Tribunal comprises only one judicial member.

There are three other Deputy Presidents who sit part-time in the Division: Ms Anne Britton, Ms Jane Needham SC and Emeritus Professor Michael Chesterman. In addition there are 17 judicial and

12 non-judicial members all of whom sit on a sessional basis.

Legislation

In 2009 the AD Act was amended to allow the Tribunal to review decisions of the President of the ADB, in relation to applications for exemption from the AD Act or the Regulations. A person affected by an exemption decision by the President may apply to the Tribunal for review of the decision to grant, refuse, revoke, or vary an exemption. The Amendment also increased the upper limit for awards of damages under the Act, from \$40,000 to \$100,000 for new complaints.

Case Load

The outcomes for each category of application is discussed briefly below.

Referred complaints

If a complaint cannot be conciliated or it cannot be resolved for some other reason, the President of the ADB may refer it to the Tribunal. One hundred and seven original complaints were referred this year and 115 were finalised. Of those 115, 76 (66%) were settled or withdrawn, 18 (16%) were summarily dismissed, 14 (12%) were dismissed after a hearing and 7 (6%) resulted in orders being made in favour of the applicant. The low proportion of matters in which an order is ultimately made in favour of an applicant comes about because the majority of meritorious complaints are settled either through mediation or direct negotiation between the parties.

Mediation

The Tribunal conducts a preliminary case conference at which parties are offered the opportunity of mediation if their case is suitable. Of the 115 original complaints finalised during the year, mediation was conducted in 36 matters. Mediation is not available in relation to leave



*Deputy President
Magistrate Nancy Hennessy*



applications. Disregarding those applications mediations were conducted in slightly less than half the matters that were finalised. Of those matters which did go to mediation 33 (92%) settled at or after mediation and 3 (8%) proceeded to a hearing. There is a significant incentive for parties to resolve complaints without having a hearing because of the high cost of litigation. If parties are legally represented, legal costs can consume a considerable proportion of any compensation that is ultimately awarded.

Grounds of complaint

A complaint may allege more than one ground of discrimination. The most frequently cited grounds of discrimination were disability (45), race (37), sex discrimination (25) and sexual harassment (15). There were 18 complaints alleging victimisation of a person as a result of them making a complaint. Age discrimination complaints were more common than in previous years (12) but there were fewer complaints about discrimination on the ground of having responsibilities as a carer (9), homosexuality (2) and marital status (1). The Tribunal received six complaints of racial, homosexuality, transgender or HIV/AIDS vilification.

Applications for leave to proceed

Where a complaint is declined by the President of the ADB because, for example, it lacks substance or is frivolous or vexatious, the complainant must obtain the Tribunal's "leave" or permission before being allowed to proceed. Twelve applications for leave were pending at the beginning of the year and the Tribunal received 27 new applications during the year. Of the 36 matters disposed of during the year, leave was granted in 9 cases (25%) and refused in 16 cases (44%). The applicant withdrew the application or settled the complaint in the remaining 11 cases (31%). Three applications remain pending at 30 June 2009.

Applications for the registration of conciliation agreements made at the ADB

The Tribunal also has jurisdiction to register conciliation agreements made when the complaints are still with the President of the ADB. The point of registration is that, as long as it contains terms that the Tribunal has power to order, the agreement, once registered, can be enforced as an order of the Tribunal. Two applications for registration were made this year and four were finalised. The Tribunal registered one agreement and declined to register another. Three applications for registration were withdrawn.

Applications for interim orders

The President of the ADB, or a party to a complaint, may apply to the Tribunal for an interim order to preserve the status quo between the parties, or the rights of the parties, pending determination of the complaint. This year four new applications for interim orders were made. Consent orders were made in relation to one application and the other three were withdrawn.

Disposal rates

The Equal Opportunity Division's time standards for disposal of matters is 80% of matters to be finalised within 12 months and 100% within 2 years. This year 104 (90%) were finalised within 12 months and 112 (97%) within 2 years. This was a significant improvement on the previous financial year. The remaining 3 matters were more than two years old when they were finalised.

Significant Cases

Three kinds of decision stand out as being atypical this year. First, there were several decisions relating to the meaning of "services" in the AD Act. To be unlawful, discrimination must occur in a specified area of public life. One of those areas is the provision of goods and services. The meaning of that word has been the subject of considerable argument since the AD

Act was first passed. Last year several more decisions were added to the list. Secondly, a significant number of decisions related to the Tribunal's discretion to allow a complaint to be amended after the President has referred it to the Tribunal. This is a new power introduced by amendments which commenced on 2 May 2005 via the *Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004*. Finally, the scope of the exemption for religious bodies in the AD Act was the subject of close examination for the first time.

Meaning of 'services'

In *Arnesen v Commissioner, NSW Department of Corrective Services* [2008] NSWADT 294 and *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSWADT 308, the Tribunal was required to consider whether prison inmates who wanted to vary their security classifications to access more favourable conditions were being provided with a 'service' within the meaning of that term in the AD Act. In *Arnesen* the Tribunal held that considering an application to vary a prisoner's classification constituted a service. However, in *Arnesen*, the Tribunal ultimately decided that a requirement that an inmate have Australian citizenship before his classification could be changed was not discriminatory. In *Contreras-Ortiz*, the Tribunal found that the Commissioner had provided the applicant with the service of considering whether the classification of inmates should be varied for the purposes of the provision of appropriate development programs. The Commissioner had discriminated against the applicant on the ground of race by preventing him, as an unlawful non-citizen, from acquiring a favourable security status or being considered for a work order or local leave permit enabling work or employment outside a correctional centre. The Tribunal made an order preventing the Commissioner from continuing or repeating the contraventions of the AD Act.

In *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119, the applicant contended that the respondent had imposed a term in the provision of services which constituted indirect discrimination against her on the ground of disability. The applicant said that the pedestrian access to her apartment was unsuitable due to her symptoms relating to multiple sclerosis. The Tribunal decided that two of the three services the applicant said she had been refused had not been identified with sufficient precision. The Tribunal concluded that the remaining service, providing accessible entrances and exits from the common property to individual apartments within the complex, had in fact been provided.

Amendment decisions

In *Hurst v Star City Pty Ltd* [2009] NSWADT 65, Mr Hurst claimed that, while dressed as a woman, he was refused entry to a bar located in Star City Casino. He said that the refusal constituted unlawful transgender discrimination in the area of services. Mr Hurst sought to amend his complaint to include an allegation of unlawful sex discrimination. The Tribunal noted it has a wide discretion when deciding whether to amend a complaint, but refused the amendment in this case on the ground that it was futile. To succeed as an allegation of sex discrimination, Mr Hurst would need to establish that he was subjected to less favourable treatment than a woman not, as he submitted, than as a 'man dressed as a woman'. As there was no way of comparing Mr Hurst's situation with that of a woman, an amendment adding that ground of discrimination was futile.

In *Neeson v Director-General NSW Department of Education and Training* [2008] NSWADT 330, the Tribunal allowed the applicant to amend his complaint, finding that the factual allegation in the proposed amendment was narrow and its determination was unlikely to add to the length of the hearing.

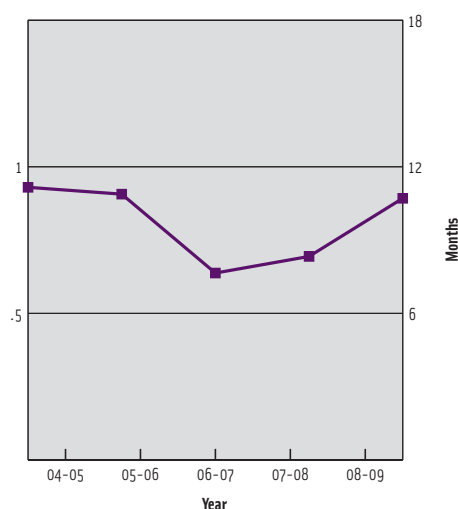
In *Trad v Jones* [2008] NSWADT 272, Mr Trad lodged a complaint against Alan Jones for racial vilification during his morning radio broadcast. The respondents argued that the Points of Claim went beyond the scope of the complaint that had been referred to the Tribunal by including segments of the program not mentioned in the complaint. The Tribunal held that the narrow approach advocated by the respondent was at odds with the statutory regime, where the only requirement for a valid complaint is that it be in writing and allege a contravention of the Act. The Tribunal rejected the respondents' contention that the Points of Claim extended the scope of the complaint and it was not necessary to consider whether leave to amend the complaint should be granted.

In *Kesby v Nguyen-Dang* [2009] NSWADT 34, Ms Kesby alleged sexual harassment and victimisation against a former colleague and unlawful discrimination on the ground of sex and victimisation against her former employer. Ms Kesby applied to amend her complaint of unlawful discrimination on the ground of sex in respect of her employment in her colleague's private rooms. Ms Kesby was unable to identify who her employer was at the private practice. The Tribunal refused to amend her complaint because if the amendment sought by Ms Kesby were granted it would be necessary to identify the employer and, if it was someone other than the respondent, decide whether that person should be joined to the proceedings. The substantive proceedings would come to a halt until those issues were resolved.

Religious exemption

In *OV v QZ (No.2)* [2008] NSWADT 115, a same sex couple contacted Wesley Dalmar Child and Family Care to make enquiries about becoming foster carers. (Wesley Dalmar was operated by Wesley Mission, which in turn is an unincorporated arm of the Uniting Church.) The applicants were told an application from a same-sex couple would not be accepted. They alleged that the respondents discriminated against them on the ground of marital status and homosexuality in the provision of services. The respondents relied upon s 56 which exempts 'appointments by a body established to propagate religion' and 'any act or practice of that body that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.' The Tribunal found that the applicants' complaints on the ground of homosexuality were substantiated and that the respondents did not make out the exemption in s 56. Wesley Mission has appealed against that decision.

Equal Opportunity Division - Average Disposal Time



Retail Leases Division

The Divisional Head is Emeritus Professor Michael Chesterman, part-time Deputy President.

Structure and functions

The Division exercises jurisdiction conferred by the *Retail Leases Act 1994* ('RL Act') on the Tribunal to determine applications relating to 'retail shop leases' as defined in this Act. The Supreme Court, the District Court and the Local Court may also exercise jurisdiction in civil proceedings brought under this Act. But section 75(2) of the RL Act establishes a 'general principle' that retail tenancy disputes 'should be dealt with by the Tribunal rather than by a court'.

The *RL Act* requires in section 68 that, except where a party to a lease applies for an order in the nature of an interim injunction, mediation by the Retail Tenancy Unit must be attempted, or must be found to be unlikely to resolve the dispute, before any proceedings may be taken in the Tribunal or in any other court or tribunal.

The RL Act makes provision for two categories of claim: retail tenancy claims and unconscionable conduct claims. An application may be a 'combined claim', involving claims in both these categories.

Case load

At the beginning of the year, 129 applications under the RL Act were pending. During the year, 255 new applications were filed and 242 applications were disposed of, so that at the end of the year the number of applications pending had increased by 13 to 142. This represents something of a return to the pattern of a number of recent years, in that the Division was not able to dispose of as many applications as were filed.

The number of new applications (255) was about the same as last year's figure of 261. Also similar to last year was the number of new applications within a significant type of jurisdiction only recently acquired by the Division: that is, the appointment of specialist retail valuers to

determine, or review a determination of, the current market rent payable under a lease. This year, the Tribunal received 58 of these 'valuer applications', compared with 64 in the preceding year.

Under the RL Act, valuer applications fall within the category of retail tenancy claims. But because the task undertaken by the Tribunal is primarily administrative, they differ significantly from other types of retail tenancy claim. It is preferable, when setting out statistics relating to the Division's work, to treat them as a separate category.

Among the 255 new applications, 58 (22.75%), as just mentioned, were valuer applications; 143 (56.08%) were retail tenancy claims in other categories; 2 (0.78%) were unconscionable conduct claims; and 52 (20.4%) were 'combined' claims, involving both retail tenancy claims and unconscionable conduct claims.

The proportion of unconscionable conduct claims and 'combined' claims filed this year was lower than last year. This may reflect a growing awareness that the requirements of success in an unconscionable conduct claim, as set out in s 62B of the RL Act and the associated case law, are more demanding than may appear at first sight. During directions hearings, Judicial Members of the Division sometimes feel obliged to suggest to applicants that they should consider abandoning the unconscionable conduct claim that they have included in their 'combined claim'. The reason given is that the facts alleged fall short of what the Act and the case law require. An applicant may take up this suggestion without in any way prejudicing his or her accompanying retail tenancy claim(s).



*Deputy President
Michael Chesterman*

Of the 242 applications that were disposed of, the outcomes were as follows: 172 (71.1%) were withdrawn, discontinued or dismissed before hearing, or were settled with consent orders being made; 2 (0.8%) were transferred to the Supreme Court; 5 (2.07%) were dismissed on the ground of lack of jurisdiction; 7 (2.9%) were dismissed after a hearing; and in 56 (23.14%), orders were made.

An interesting feature of these figures is that both the number and the proportion of applications dismissed after a hearing were unusually low. The rate of disposal (71.1%) of claims without a determination by the Tribunal or a transfer to the Supreme Court was relatively normal.

During the year, 11 appeals (compared with 9 in the preceding year and only two in the year before that) were determined by an Appeal Panel on appeal from the Division. Seven of these appeals were allowed in whole or in part and 4 were dismissed.

Timeliness

According to time standards adopted by the Division, 85% of the applications made to it should be disposed of within six months and 100% within one year. Regrettably, it has not proved possible to adhere to these standards. Of the 242 applications disposed of in 2008-09, 160 (67.8%) were disposed of within six months and 211 (88%) within a year. These percentages are about the same as in the preceding year.

Significant themes

The many matters dealt with this year in the cases decided by the Division included:

- The Tribunal's jurisdiction under the Act;
- The interpretation of Schedule 1 of the Act, which forms part of the statutory definition of a 'retail shop lease';
- The interpretation of section 10, which deals with pre-lease misrepresentations;
- The return of bond money paid by a lessee;

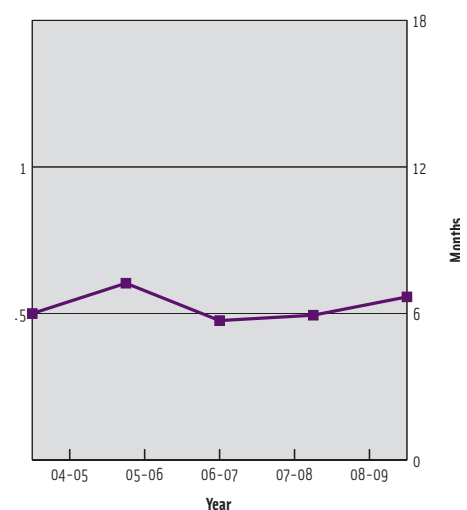
- The exercise of an option to renew conferred by a lease;
- The relationship between the clauses in a lease identifying a guarantor and the remainder of the lease;
- Estoppel;
- The principles governing the appointment of specialist retail valuers; and
- The circumstances in which costs orders may be made with respect to proceedings under the RL Act.

Legislative developments

In April 2008, the Department of State and Regional Development issued a Discussion Paper entitled 'Issues affecting the retail lease industry in NSW'. It contained numerous proposals for reform of the RL Act.

In June 2008, the Tribunal sent to the Retail Tenancy Unit a submission addressing a number of these proposals. To date, no amendments to the Act have been submitted to Parliament.

Retail Leases Division - Average Disposal Time



Appeal Panel

The President manages the operation of the Appeal Panel and the listing of appeals.

Structure and Functions

In its usual configuration, the Appeal Panel for internal appeals comprises a presidential member (i.e. the President or a Deputy President), a judicial member and a non-judicial member. The ADT Act requires that at least one of the first two members be from the Division giving rise to the appeal, and the third member always be from the Division giving rise to the appeal. In the case of external appeals, the usual configuration is a presidential member, a judicial member and a non-judicial member. The Act requires the non-judicial member to be a person endorsed as having experience in dealing with persons with a disability.

The usual listing practice in the case of internal appeals is for the President or the relevant Divisional Head to preside unless there is an impediment (such as one of those members having presided in the matter below). In the case of external appeals, the Deputy President responsible for managing the Guardianship and Protected Estates List usually presides.

Since 2004 the ADT Act has allowed for a presidential member to preside alone to deal with interlocutory appeals for the purpose of considering whether to grant leave to appeal. In line with the explanation given to Parliament at the time as to the intent of the 2004 amendments, it was thought that the Act also allowed that member to go on and dispose of the substantive appeal. Depending on the urgency and nature of the interlocutory appeal, the listing practice between 2004 and 2009 had varied between allowing a single presidential member to proceed to deal with the appeal and constituting a full Appeal Panel. The Court of Appeal ruled in 2009 that the Act did not allow for the presidential member to proceed alone to deal with the second stage. The Act has been

amended to reinstate the practice that had been followed since 2004.

Case Load

During the year there were 95 appeals filed, 75 internal and 20 external.

The Appeal Panel disposed of 104 appeals – 82 internal and 22 external.

Of the internal appeals, 36 were successful in whole or in part, 31 were dismissed after hearing, and the balance were resolved, withdrawn or discontinued without proceeding to hearing.

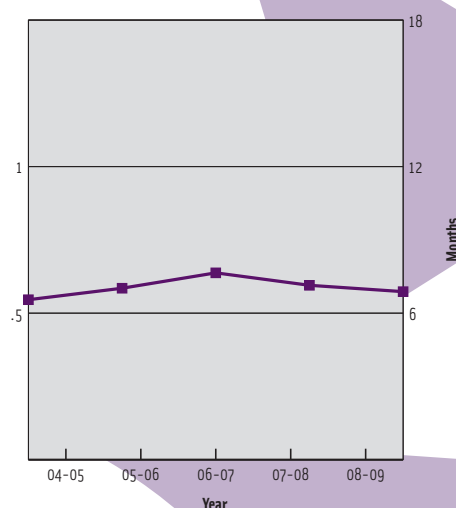
As noted in the section of the Report dealing with Guardianship and Protected Estates matters, 8 external appeals were upheld, 5 dismissed and 9 withdrawn or discontinued.

Overall the Appeal Panel disposed of more appeals than filings received, giving rise to an improvement in the clearance rate for appeals as compared to last year.

This section commences by reviewing some of the more significant decisions of the Appeal Panel. It then deals with Supreme Court and Court of Appeal decisions relating to Divisional and Appeal Panel decisions. As explained earlier, the normal route to the Supreme Court or the Court of Appeal is by way of exercise of a right of appeal from an Appeal Panel decision or a Divisional decision.

Sometimes a Tribunal decision comes under notice by way of a referral of question of law or a judicial review application.

Internal Appeals - Average Disposal Time



Appeal Cases: Overview

(I) APPEAL PANEL

The following survey includes abbreviated references to the case, so for example 09/27 means the appeal reported at [2009] NSWADTAP 27.

INTERNAL APPEALS

From General Division

Freedom of Information: section 57. Reversing earlier authority at first instance, the Appeal Panel held that the Tribunal's jurisdiction when considering an agency claim that a document is a 'restricted document' is exhausted if the Tribunal is satisfied under s 57 that the agency had 'reasonable grounds' for the claim. The Tribunal is not permitted, as it can with claims related to documents not falling into the 'restricted' category, to go on to the usual further questions - whether the document is actually exempt and whether any residual discretion should be exercised to release it even though it is exempt. 08/79 and 08/80.

Freedom of Information: Investigations of Alleged Misconduct. The Tribunal decision had held that certain material (legal advice, information supplied in confidence) in an investigator's report for which exempt status had been claimed, should be disclosed to an employee whose conduct had been investigated. The Appeal Panel reversed the decision. It agreed with the Tribunal, that legal advice privilege may not attach to such a report merely because it is to be furnished to the agency's lawyers to facilitate the provision of legal advice (cl 10). On the other hand, it considered that the Tribunal had misapplied the law as it related to the exemption relating to material supplied in confidence to the investigator (cl 13), extended the appeal to the merits, and reversed the Tribunal's decision in that regard. 08/46.

In two other appeals the Appeal Panel dealt with the operation of the 'confidential source of

information' protection against release (cl 4(1)(b)). See 09/33 and 09/2.

Privacy – Practice and Procedure. Conduct was placed in issue before the Tribunal that had not been raised in the original complaint to the agency, and therefore was not considered on internal review. The Appeal Panel held that in those circumstances, the conduct cannot be subject to external review by the Tribunal. 09/44.

The absence of an express time limit in s 55 of PPIPA governing the filing of an application for review of conduct of an agency did not mean that there was no time restriction. The Appeal Panel held that the provision should be read so as to imply a 'reasonable time' limit. In the present case, two years was too long. The Appeal Panel was of the view that ordinarily 60 days after finalisation of the internal review should be regarded as the time limit, drawing on the approach found in the FOI Act. 09/1.

Privacy – "Personal Information" – scope of exclusion – section 4(3)(j) – information relating to suitability for employment. The Appeal Panel affirmed a line of authority in the Tribunal holding that this exclusion could extend to circumstances that went beyond formal appointment, promotion or removal processes. 09/25.

Occupational licensing – mandatory refusal on the ground that applicant convicted of offences 'involving fraud, dishonesty or stealing'. The Appeal Panel held that such a provision was not confined to offences where the itemised conduct was an element of the offence. An offence may, as a matter of fact, arise out of circumstances that 'involve' the itemised conduct even though it is not an element of the offence. 08/49.

Accredited certifiers – professional misconduct. The Appeal Panel considered the circumstances in which a finding of professional misconduct should be made, as opposed to unsatisfactory professional conduct. 08/48.

Guardianship Tribunal – procedural fairness – urgent telephone hearing. The Guardianship Tribunal had conducted an urgent telephone hearing. After the hearing, but before the decision was made, the Guardianship Tribunal considered a report that contained material that was extremely prejudicial to the appellant. The Guardianship Tribunal subsequently made a continuing guardianship order for a period of 12 months, appointing the Public Guardian. The Appeal Panel held that, as the Tribunal did not give the appellant an opportunity to respond to the material prior to making its decision, a temporary order should have been made. It was unnecessary for the appellant to prove that the adverse material affected, or could have effected the decision. 09/30

Tribunal Practice – costs – new test. The Appeal Panel has considered how the amended s 88 of the ADT Act is to be applied. The new provision retains the position that ordinarily there is to be no order for costs, but the exception now allows for a costs order if it is 'fair' to do so having regard to various factors. In this instance the Appeal Panel saw it as fair to order costs where an application had been filed well out of time, and put the respondent to expense. 09/22.

Practice and procedure – costs order made without taking submissions. The Tribunal had directed the parties to file written submissions on the question of costs. The respondent requested the Tribunal to 'reserve making submissions pending the making of a finding by the Tribunal that may activate the costs order'. The Tribunal proceeded to deal with costs. The Appeal Panel held that the Tribunal should not have made a costs order in the absence of any further communication with the parties. The Tribunal could have rejected or accepted the respondent's request, but failure to adopt either procedure meant it had failed to comply with s 73(4)(c) of the ADT Act. 08/70

Practice and procedure – suppression order – section 75 of ADT Act. The Appeal Panel noted that the purpose to be served by a suppression

order may be 'any ... reason' whatever, and the power arises when the Tribunal is satisfied that the making of the order is desirable. Where a suppression order is made the circumstances should be 'special' or 'out of the ordinary'. 08/69.

From Equal Opportunity Division

Victimisation – causation test. Section 50 of the ADA declares unlawful any conduct that subjects a person to a detriment because the person has done one of the things listed in the section (such as bringing a complaint of unlawful discrimination or giving evidence in support of a complaint), or is thought to have done such a thing. The Appeal Panel held that the Tribunal had applied too narrow a test in concluding that s 50 was not made out. The Tribunal should have asked itself whether the fact that the applicants had done one of the things listed in s 50(1)(a) to (d) was at least one of the 'real', 'genuine' or 'true' reasons for being subjected to a detriment. That reason must have been a reason which, either alone or in combination with other reasons, was the true basis for the treatment. Depending on the circumstances, the motive and purpose of the alleged discriminator, as well as the effect on the aggrieved person, may all be relevant for establishing causation in victimisation complaints. 09/20.

Sexual harassment – provision of 'services'. A prisoner complained of sexual harassment by a correctional officer who had conducted a strip search of the prisoner. The ADA declares unlawful sexual harassment if it occurs when 'providing services'. In this case, the Tribunal had asked itself whether a strip search of the respondent could be characterised as a 'service' to *all the inmates* within Long Bay gaol and held that it could. However, this was not the precise question to be answered. What mattered was whether any strip search that took place should, in the particular circumstances, be regarded as constituting, or forming part of, a course of action by correctional officers that amounted to

the provision of 'services' to the respondent. The Tribunal therefore erred in law by applying an incorrect criterion to the question to be resolved. The Appeal Panel remitted the proceedings back to the Tribunal. 08/85.

Discrimination - indirect discrimination - defence of statutory authority. The Tribunal found that a respondent of Macedonian origin had been discriminated against on the ground of race, when he was demoted for being unable to read English to a satisfactory level (the literacy requirement). The employer appealed. The Appeal Panel held that the Tribunal had not applied the 'comparator' test correctly. Section 7(1)(c) requires a comparison between the proportion of Macedonians and people "not of that race" who can comply with the [literacy] requirement. The Tribunal's conclusion that the comparison must be 'between Macedonians and people not of that race, namely the dominant group of Anglo-Australians' was erroneous. Within the base group identified by the Tribunal - those employees of the employer who were or who aspired to be supervisors - the two 'pools' designated for determining comparative rates of compliance (in the sense of capacity to comply) with the literacy requirement should have been members of the group whose race was Macedonian (including the applicant) and members whose race was not Macedonian. The Appeal Panel also considered the employer's defence of statutory authority. However, the employer was unable to demonstrate that it was necessary to remove the respondent from his position in order to comply with the *Occupational Health and Safety Act 2000* (NSW). The Appeal Panel remitted the proceedings to the Tribunal. 09/39.

From Retail Leases Division

Breach of landlord's covenant - obstruction of access to facilities by third party. The tenant was obstructed in obtaining access to leased premises by the conduct of a third party. The question was whether the lessor was in breach of

its obligation to ensure unobstructed access. The Appeal Panel considered that the lessor's duty extends to taking reasonable action to ensure that anything done by a third party, including another tenant within the building, does not infringe the affected tenant's rights. The other tenant had erected obstructions in a common area of the building. The Appeal Panel held that it was indisputable that the lessor had the power to require to 'correct or terminate' what had been done, and owed the affected tenant an obligation to take action, which it had breached. 08/43.

Pre-lease misrepresentation - position of assignee. The issue was whether the statutory liability for pre-lease misrepresentation attaches to an assignee of the representor. The Appeal Panel held that an innocent assignee is not affixed with the statutory liability. It construed the relevant provision, RLA s 10(1), as only affixing liability to the maker of the representation, and confining the right to sue to the recipient of the representation. 09/3

Option to Renew - Notice given by Third Party - Agency - Authority arising from course of dealings. The Tribunal ruled that a notice to exercise an option to renew was not effective because a named co-lessee who was not a signatory to the notice, had not authorized its issuance. Some time before the notice was issued the co-lessee had ceased to have any connection with the operation of the business and the lease. The notice had been given by two persons, one was the other named co-lessee and the other was a third person. The third person managed the leased premises and the business conducted there. The co-lessors had routinely dealt with the third person in relation to the operation of the lease. In these circumstances, the Appeal Panel considered that the third party had the authority of both co-lessees to manage their affairs including in relation to the exercise of the option, and this was apparent to the

lessors. The named co-lessees were bound by the exercise of the option and accordingly, the notice was effective and the lessor was bound by it. 08/83.

Specialist Retail Valuer. The Appeal Panel held that it was not open to the Australian Property Institute to cancel its appointment of a person as a specialist retail valuer under a retail shop lease. This was not, in the view of the Appeal Panel, a situation where a power to appoint ought be construed as implying a power to revoke. 09/3.

Jurisdiction – ‘retail shop lease’. The Appeal Panel held that an item in the list of retail shop uses ‘Second-hand goods shops’ does not extend to used car dealers. Accordingly the RLA does not apply.

In another case, the Appeal Panel reviewed a decision of the Tribunal in which it determined whether the relevant lease was a ‘retail shop lease’ as a preliminary question. The Appeal Panel criticised the Tribunal for basing its determination on jurisdiction solely on the evidence contained in the affidavits of the two Lessees. A decision as to the jurisdiction of the Tribunal in proceedings instituted under the RL Act should not be a decision which, like other interlocutory decisions, is provisional only and limited as to duration. Even if the issue of jurisdiction is designated as a ‘preliminary issue’, the Tribunal’s decision should resolve finally as between the parties such issues of fact and law as are required to establish that the Tribunal either possesses, or does not possess, jurisdiction to hear and determine the application to which it relates. 08/54 and 08/76.

From Revenue Division

Land tax – principal place of residence exemption – deemed or actual occupation. The Tribunal was found to have erred in relation to the question of whether the respondent was entitled to a concession for an intended place of

residence, because it applied part of the concession for ‘unoccupied land’ to bring the respondent within the ‘sale of former residence’ concession. The Appeal Panel held that in order for the respondent to qualify for either concession, she would have had to have fulfilled each of the statutory conditions set out in the relevant clause of Schedule 1 of the LTM Act. The deeming provision in clause 6 could not apply to rescue the use of the vacant property by elevating it to an actual use and occupation and not to construction and planning of a dwelling. In addition, the respondent could not qualify for the concession in clause 7, unless she was physically occupying the vacant property as her home. 08/66.

Land tax – principal place of residence exemption – contiguous land. Land tax was levied on a block of land next to the block containing the principal place of residence. The taxpayer objected that the neighbouring block formed part of the ‘parcel of land’ containing the principal place of residence and should be exempt. The Tribunal upheld the objection. The Appeal Panel reversed the decision. It endorsed prior authority to the effect that for neighbouring blocks owned in the same interest to form part of a parcel they must be ‘undivided by physical separation’. In its opinion, in the circumstances it was not open to conclude that this criterion had been met. Like the Commissioner, it saw the claim as defeated by the presence of a brick dividing fence along most of the boundary. It held that ‘undivided by physical separation’ must, at least, bear the connotation ‘significantly’ or ‘substantially’ undivided. 08/61.

Land tax – principal place of residence exemption – subjective and emotional connection. The taxpayer resided most of the time with a partner in another State. The residence in NSW on which land tax had been levied was only occupied for approximately 10%

of the year and usually over holiday periods. The Appeal Panel held, reversing the Tribunal below, that considerably more than subjective intention and emotional connection would need to be shown in order to establish entitlement to the principal place of residence exemption in such circumstances. 09/21.

Land tax – primary production exemption – keeping of bees. The Appeal Panel reversed a Tribunal decision holding that a bee-keeper was not entitled to a primary production exemption from land tax. The taxpayer needed to show that the land was ‘primarily’ used for the ‘keeping of bees thereon’. The Tribunal held against the taxpayer because of the restricted size of the land actually occupied by hives. The Appeal Panel held that this approach was too narrow. The only evidence before the Tribunal supported the conclusion that the bees foraged over most of the land, and that other parts of the land were used as buffers, so that on the proper construction of the section, the only conclusion open to the Tribunal was that the land in question was ‘primarily’ used for the keeping of bees. There was no other actual use. 09/17.

(2) SUPREME COURT

During the year the Court received 18 filings and disposed of 15 filings affecting the Tribunal. Eleven appeals were allowed in whole or in part and 4 were dismissed.

(A) COURT OF APPEAL

Tender of Police Confidential Criminal Intelligence in Occupational Licensing Reviews: In proceedings for review of a refusal to license a security guard, the Commissioner sought to place before the Tribunal in confidence criminal intelligence information, utilising the facility given by the Security Industry Act, s 29(3). The Tribunal directed the Commissioner to provide the respondent with particulars of ‘any alleged past conduct’ on which the refusal was based,

specifically, ‘precise details of the time at which, place at which and manner in which it was alleged that the conduct took place.’ The Commissioner’s application for judicial review was unsuccessful before the single judge of the Supreme Court. The Commissioner appealed to the Court of Appeal. The Court of Appeal upheld the appeal. It ruled that the scheme created by the legislation is such that where the information that the Commissioner seeks to rely upon is of the kind that falls within the scope of the provision, the review applicant is not entitled to an order of the kind made by the Tribunal. Section 29(3) operates as a limitation on the usual right that the applicant be provided with all relevant material given by s 73 of the ADT Act. *Commissioner of Police New South Wales v Gray* [2009] NSWCA 49.

State Revenue: Pay-roll Tax: Liability of Sub-Contractors. B & L and L & B (the appellants) were family companies; B & L was the principal contractor to builders of homes and apartments, and L & B fulfilled B & L’s contracts by subcontracting with various entities (sole traders, partnerships and companies) to do the work. The Commissioner issued assessments to the appellants that were based on the premise that the remuneration paid by L & B to 47 entities should have been included in L & B’s pay-roll for pay-roll tax purposes. The Appeal Panel had concluded that all of the relevant entities were independent contractors and that all but five of those entities were not required to be included in L & B’s returns because they satisfied s 3A(1)(f) (the two-person exemption). Under that provision, entities that were subcontractors to L & B would still be deemed employees by s3A if L & B (as the designated person in s3A(1)) was supplied with their services in relation to the performance of the work, unless, in relation to any such entity (defined in s3A(1)(f) as the “contractor”) the work to which those services related was performed by two or more employees of the contractor or two or more

persons who supplied services for the contractor: s3A(1)(f)(ii); or performed, where the contractor is a natural person, by the contractor and one or more persons employed by, or who provided services for, the contractor. The Court of Appeal held that no error of law vitiated the Appeal Panel's decision. The appellants had failed to prove they were entitled to the 'two-person exemption' (s 3A(1)(f)(i)) in respect to three of the five disputed entities by satisfying s 3A(1)(f), as the evidence did not establish that another person or persons provided services for the entities. Section 3A(1)(f) is directed, in terms, to persons providing services *for the contractor*. That was the relevant question and it was correctly addressed by the Appeal Panel. With respect to the other two disputed entities, the appellants claimed the Appeal Panel failed to apply the correct onus of proof on the balance of probabilities. The Court was not persuaded that the Appeal Panel erred, the rules in *Jones v Dunkel* and *Browne v Dunn* alleged to be infringed, did not apply and there was no denial of procedural fairness. *B & L Linings Pty Limited v Chief Commissioner of State Revenue* [2008] NSWCA 187.

Freedom of Information: Effect of Agency Exclusion: A single judge reversed an Appeal Panel decision favourable to the access applicant and restored the Divisional decision. The access applicant appealed unsuccessfully to the Court of Appeal. The agency had claimed that it was not required to process an access application where it concerned documents the subject of a partial agency exclusion (see s 9 and Sched 2). Specifically the Court held that the Appeal Panel's view that the agency must in these circumstances proceed to issue a formal determination was in error. *McGuirk v Independent Commission Against Corruption* [2008] NSWCA 302.

Constitution of Appeal Panel for Interlocutory Appeals. The Appeal Panel constituted by a

single presidential member dealt with an agency appeal against the grant of a stay, both on the question of whether leave to appeal should be granted and the substantive disposal of the appeal. The Court of Appeal held that amendments made in 2004 to the ADT Act relating to the conduct of interlocutory appeals, ss 113(2B) and 24A(2)(a) did not permit the substantive stage to be undertaken by a single presidential member. (The Act has since been amended to restore the practice contemplated by the 2004 amendments, whereby both aspects of an interlocutory appeal may be dealt with by a single presidential member. See ss 113(2B) and 24A.) *Avilion Group Pty Ltd v Commissioner of Police* [2009] NSWCA 93.

Legal Services Division: Tribunal Summons to Bar Council for Documents: Refusal to Produce:

In the course of disciplinary proceedings brought against a barrister by the Bar Council, the Tribunal issued a summons requiring the Bar Council to produce documents it considered relevant to the proceedings. The Bar Council objected on the grounds that it was not compellable by virtue of a statutory protection given to it in connection with the 'administration' of its responsibilities under the Legal Profession Act (see 1987 Act, s 171R). The Tribunal refused the Bar Council's claim to protection and held that s 171R does not affect the Tribunal's statutory powers to compel persons to give evidence and/or produce documents subject to 'considerations of fairness'. The Court of Appeal held that the Tribunal made an error of law by approaching the matter on the basis of general considerations of fairness and/or on the basis of what would be relevant for the purposes of upholding a subpoena. While procedural fairness is not displaced by s 171R, it does not follow that the possibility of procedural unfairness makes a person compellable to produce documents. Other remedies may be available, such as rejecting evidence under s 135 of the Evidence

Act 1995, staying the proceedings, or dismissing the complaint. A person with the protection of s 171R cannot be compelled to give evidence or produce documents on the basis of an implied waiver. The Council itself made no express or implied assertion in the proceedings about the content of the documents and there was no inconsistency between any aspect of the Bar Association's conduct of the proceedings and its maintaining the protection of s 171R. Accordingly, there could be no waiver of s 171R. *Council of the New South Wales Bar Association v Archer* [2008] NSWCA 164.

(B) SUPREME COURT (SINGLE JUDGE)

From Appeal Panel

Retail Leases: Calculation of Damages: The Appeal Panel affirmed a Tribunal decision where the calculation of damages treated the loss suffered by the company lessee as the same as the family members who owned and operated the company. The Court ruled that the task confronting the Tribunal was not one of assessing whatever loss may have been suffered by the directors (whether it be as shareholders or in some other capacity). It was erroneous to proceed to assess damages on the basis that the existence of the corporate vehicle could be disregarded. The decision was remitted. *Lessee Corporation: Wallis Lake Fisherman's Co-operative Ltd v A.C.N. 079 830 596 Pty Ltd* [2008] NSWSC 925 (Malpass AssJ).

From General Division

Veterinary Practitioners Discipline: The Tribunal affirmed one of two adverse findings of the Veterinary Practitioners Board of NSW. It agreed that the practitioner was guilty of unsatisfactory professional misconduct because he failed to provide a client to whom he had given an initial fee estimate with a further fee estimate for additional veterinary services. On appeal, the

Supreme Court upheld the Tribunal's decision, and its interpretation of cl 16 of the relevant professional code of ethics. *Kevin Polglaze v Veterinary Practitioners Board of NSW* [2009] NSWSC 347 (Johnson J).

Freedom of Information: Public Interest in Granting Access: The applicant raised a point not raised at Divisional or Appeal Panel level. The access applicant was seeking to mount a case that a conviction was unsafe, and now contended that the public interest in the administration of justice justified release of the exempted documents. The Court observed that more than a mere assertion was required, and accepted that if there was evidence that the documents could arguably assist in showing the convictions were unsafe that would be a powerful reason for granting access. The appeal was dismissed. *Gene Simring v Commissioner of Police, NSW Police* [2009] NSWSC 270 (Smart AJ).

Financial Management Order: Approach: The Appeal Panel dismissed an appeal against a Guardianship Tribunal decision imposing a financial management order. The Court allowed the appeal. The Court referred to the importance of not constraining the freedom of individuals to make their own decisions, and the high standard of proof that must be met before so ordering. The Court considered that the Appeal Panel did not pay sufficient regard to the actual state of FA's mental capacity and to the medical evidence in support of her claim that she was fully capable of managing her own affairs. The Court also took account of FA's behaviour before it in reaching this conclusion. *FA v Protective Commissioner* [2009] NSWSC 415 (Palmer J).

Premature Initiation of Supreme Court Proceedings: The plaintiff wished to have an alteration made to her name registration by the Registrar of Births, Deaths and Marriages. The Court summarily dismissed the application before it on the basis that she had not pursued available applications to the Tribunal and her

rights under the ADT Act should be exhausted before the Court's power is invoked. *Avery v State of New South Wales (Attorney General's Department)* [2009] NSWSC 353 (Schmidt AJ).

From Equal Opportunity Division

Leave for Declined Complaint to Proceed before Tribunal: The Court allowed an appeal against a refusal to grant leave on the ground that the Tribunal had misdirected itself as to the standard which should govern the consideration of the grant of leave under s 96 of the ADA. There is no onus on the applicant to show a 'substantial' or 'significant' reason for the grant of leave. All that is required is that the applicant satisfy the Tribunal as to why it is fair and just in his or her case that leave be granted. The position of both parties should be considered, and the question of leave must be determined bearing in mind the purposes of the Act, which include precluding unlawful discrimination, and the provision of a remedy to those who have been discriminated against. The Court also discussed the Tribunal's obligations to unrepresented parties under s 73 of the ADT Act. *Ekermawi v Administrative Decisions Tribunal of New South Wales* [2009] NSWSC 143 (Schmidt AJ).

Racial Discrimination in Education: Primary School: Racist Remarks to Students made by Fellow Students: School Response: The Tribunal found racial discrimination by the respondent educational authority. It appealed. The Appeal Panel upheld the appeal. The complainants appealed to the Supreme Court. The Appeal Panel considered that the Tribunal had dealt only with the first of two questions of law it was required to address. The Tribunal had addressed the issue of 'detriment' and found that the complainants had suffered a 'detriment'. However it had not gone on to address the question of whether that detriment was 'on the ground of race'. The Appeal Panel extended the appeal to the merits, and concluded on the facts as found that the Tribunal could not have made a positive finding

on the second matter. The Supreme Court endorsed the approach of the Appeal Panel, and considered that its conclusions on the merits were clearly open to the Appeal Panel. The appeal was dismissed. *A v Director-General, Department of Education and Training* [2008] NSWSC 1091 (Harrison J).

Relationship between Commonwealth Workplace Relations Act and Anti-Discrimination Complaint: The applicant in proceedings under the ADA in effect alleged that termination of his employment was unlawful. The Tribunal had refused leave to proceed, the Supreme Court dismissed the applicant's application for judicial review, but the Court of Appeal quashed the Tribunal's decision and remitted the proceedings to the Supreme Court to consider the relationship between the *Workplace Relations Act* 1996 (Cth) and the ADA. The Court held that s 170HB of the *Workplace Relations Act* barred State ADA proceedings because of the nature of the claim (termination unlawful). By virtue of s 109 of the Constitution, the Commonwealth law prevailed and the appellant's summons was again dismissed. *Deva v University of Western Sydney* [2009] NSWSC 280.

Practice and Procedure

Legislation: In 2009, the ADT Act was amended by the *Administrative Decisions Tribunal Amendment Act 2008*. Those amendments came into force progressively, with most provisions commencing on 1 January 2009.

The President's Year in Review refers to the amendments to the costs provision, s 88 and to s 71 in relation to the right of audience by non-lawyer representatives.

Other amendments include the following. The joinder power of the ADT has been clarified. In the past, the Tribunal could only join another party of its own motion or on an application of the third person who wishes to become a party to proceedings. There was no express power enabling an existing party to apply to join a third person as a party. Section 67 has been amended to deal with this omission.

The ADT's summary powers of dismissal under s 73 did not include an express power to dismiss proceedings for want of prosecution. An express power has now been conferred. In addition, there is now a further power to dismiss for failure to appear, accompanied by a power to

reinstate if a reasonable explanation is given for the failure to appear. On occasions in the past, where a Registry or other Tribunal error explains the failure to appear, the Tribunal has relied on the High Court decision in *Bhardwaj* (2002) 209 CLR 597 to reopen dismissed proceedings.



The President's Year in Review also outlines the amendments to the Rulemaking provisions, in particular, the establishment of a single Rule Committee and the abolition of Sub-Committees.

A bill passed in June 2009, the *Courts and Other Legislation Amendment Act 2009*, amended s 113 of the Act to overcome the effect of the Court of Appeal ruling in *Avilion Group Pty Ltd v Commissioner of Police* [2009] NSWCA 93. The amendment allows a presidential member who hears the application for leave to appeal an interlocutory decision to go on and dispose of the appeal where leave is granted.

Rule Committee and User Groups: Following the commencement of amendments affecting the rulemaking process, a new Rule Committee met on 18 February 2009, comprising the President and the Divisional Heads *ex officio*. The legislation allows for further members to be appointed by the Minister on the nomination of the President, and by the Minister acting independently. In attendance at the meeting were the Registrar (the secretary to the Committee) and two government officers, Mr John Ledda of Parliamentary Counsel, and Ms Vicki Sarfaty from the Department's Legislation and Policy Branch. Work commenced on amendments to the Rules in relation to summonses and representation.

As noted in the President's Year in Review, one of the aims of the new Rule Committee is to reorganise the relationship between formal Rules and other information as to practice and procedure in the Tribunal. As at 1 January 2009, the Tribunal had 18 operative Practice Notes: no. 1; nos. 3-5 and 7-20. Over time, they will be replaced by content divided into Rules and Guidelines.

The Tribunal has three user groups: Freedom of Information; Privacy; and Guardianship and Protected Estates. The groups meet as needed. None of the groups have met in the last year.

Appendix F sets out the formal composition of User Groups.

Alternative Dispute Resolution: Mediation is one of two forms of alternative dispute resolution specified for use in the Tribunal by the ADT Act. The other form, neutral evaluation, is not currently in use.

The Tribunal provides trained mediators at no cost to the parties. The majority of mediators are also members of the Tribunal. Mediators who are members take no part in the hearing of the matter if mediation is unsuccessful. Mediators are appointed under s 106 of the ADT Act. A list of Mediators follows the List of Members in Appendix B.

As noted in earlier annual reports, virtually all of the matters that come before the Tribunal are required first to go through a prior formal process, such as attempts at conciliation, attempts at mediation, decision and review by a government agency or assessment by a professional conduct body. It is rare for a case to arrive 'cold' at the Tribunal. The result is that there will usually have been significant consideration given to resolving a dispute or complaint before it reaches the Tribunal. Because there is a statutory mediation service for retail tenancy disputes, it is unusual for the RLD to revisit the option of formal mediation.

However, members at directions hearings seek to encourage the parties to continue to pursue settlement negotiations. In the case of the EOD, at the initial case conference an assessment is made as to whether there remain reasonable prospects of resolution via formal mediation. Formal mediations are regularly conducted. In Freedom of Information and Privacy matters in the General Division, all filings are first referred to a planning meeting (or case conference) process, at which attempts are made to resolve the matter or limit the scope of the dispute.



Appendices

Appendix A: Financial Information

Administrative Decisions Tribunal & Legal Services Division Financial Information as at 30 June 2009¹

	ADT			LSD ¹	TOTAL
	Actual	Budget	Variance	Actual	Actual
	\$	\$	\$	\$	\$
Employee Related Payments (Including Crown Liabilities)	2,047,522	1,933,466	(114,056)	251,769	2,299,291
Property Items	326,708	343,416	16,708		326,708
Other Operating	1,192,335	1,076,063	(116,272)	58,342	1,250,677
Depreciation	71,882	67,607	4,275		71,882
Total Expenditure	3,638,447	3,420,552	(217,895)	310,111	3,948,558
Total Revenue²	(857,026)	(855,577)	1,449	(310,111)	(1,167,137)
Net Cost Of Services	2,781,421	2,564,975	(216,446)	0	2,781,421
Less Depreciation	(71,882)	(67,607)	4,275	0	(71,882)
Less Crown Liabilities	(280,045)	(272,163)	7,882	0	(280,045)
Controlled Net Cost Of Services	2,429,494	2,225,205	(204,289)	0	2,429,494

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. 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.
3. Revenue
The Tribunal received \$1,167,137 in revenue. Of this, \$1,067,657 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.

Property items =

Insurance	4201	4202
Rates & outgoings	16363	7536
Rent	300870	327801
Maintenance	5274	3877
Total	326708	343416 variance 16708

Appendix B: List of Members and Mediators

PRESIDENT

Judge KEVIN PATRICK O'CONNOR, AM, to 9 August 2010

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 2010

Assigned as set out below.

GENERAL DIVISION	Current Expiry date		
Divisional Head			
Judge KEVIN PATRICK O'CONNOR, AM, President	09.08.10	RALPH WILLIAM MERRELL	31.10.11
		BRUCE GEOFFREY THOMSON	31.10.11
		ELIZABETH ANNE WHAITE*	30.07.08
		ANN DOMINICA WUNSCH	31.10.09
Deputy Presidents			
PETER RAYMOND CALLAGHAN, SC	31.10.10	Non-judicial Members, Public Health	
MICHAEL RAINSFORD CHESTERMAN	02.10.11	ANNEMARIE HENNESSY	31.10.10
ROBIN PATRICK HANDLEY*	31.07.09	RICHARD MATTHEWS	31.10.10
Magistrate NANCY LOUISE HENNESSY	07.03.10		
JANE ANNABEL DARLING NEEDHAM, SC	02.11.11	Non-judicial Members, Accredited Certifier	
JOHN JOSEPH STEELE QC*	24.09.08	PETER GABRIEL FRIEDMANN	31.10.09
		PHILIP ARTHUR HAYWARD	31.10.09
Judicial Members		GRAHAM JOHN MALLISON	31.10.09
CATHERINE LOUISE FITZGERALD	31.10.10	GORDON PATRICK WREN	31.10.09
GAIL BARTON FURNES	31.10.10		
YVONNE GRANT	31.10.10	Non-judicial Members, Veterinary Surgeons Discipline	
SIGRID HIGGINS	31.10.10	MAGDOLINE AWAD	31.10.09
SUZANNE MAREE LEAL	31.10.09	TANYA LORRAINE CARTER	31.10.09
PETER HENRY MOLONY	31.10.10	FIONA JENNIFER CLARK	31.10.11
STEPHEN HENRY MONTGOMERY	31.10.10	ANDREW JONATHAN DART	31.10.09
LINDA MARY PEARSON*	10.07.09	PETER KENNETH KNIGHT	31.10.09
ROBERT BRUCE WILSON	31.10.10	ROSALIE JANE MAYO-RAMSAY	31.10.11
		RUTH ROSEMARY THOMPSON*	30.07.09
Non-judicial Members			
ZITA ROSE ANTONIOS	31.10.11	Non-judicial Members, Education	
CLIFFORD DOUGLAS BLAKE, AO	31.10.10	TERENCE RICHARD BURKE, AM	31.10.10
MARY ELIZABETH BOLT	31.10.10	JOLYN MARGARET KARAOULIS, AM	31.10.10
ROSS ANDREW FITZGERALD	31.10.11	JOSEPH RIORDAN, AO	31.10.10
ANNETTE FRANCES O'NEILL*	31.10.08		
Presidential Members assigned to Guardianship and Protected Estates list		Non-judicial Members, Architects	
ANNE KATHLEEN BRITTON	11.10.09	JANE MARGARET JOSE	31.10.10
ROBIN PATRICK HANDLEY*	31.07.09	PATRICK JOHN O'CARRIGAN	31.10.10
Magistrate NANCY LOUISE HENNESSY	07.03.10	PETER ROY WATTS	31.10.10
Judicial Members assigned to Guardianship and Protected Estates list		EQUAL OPPORTUNITY DIVISION	
SUZANNE MAREE LEAL	31.10.09	Divisional Head	
JULIAN JOSEPH MILLAR	31.10.09	Magistrate NANCY LOUISE HENNESSY, Deputy President	07.03.10
Non-judicial Members assigned to Guardianship and Protected Estates list		Deputy President	
MARY ELIZABETH BOLT	31.10.10	ANNE KATHLEEN BRITTON	11.10.09
BARBARA RUTH FIELD	31.10.09	MICHAEL RAINSFORD CHESTERMAN	02.10.11
JENNIFER GREEN	31.10.08	JANE ANNABEL DARLING NEEDHAM, SC	02.11.11
LYNN MARY HOULAHAN*	31.10.08		

Judicial Members

LARISSA YASMIN BEHRENDT*	31.10.08
DAVID LEE BITEL	31.10.09
JENNIFER LOUISE CONLEY	31.10.10
GAIL BARTON FURNESS	31.10.10
PENELOPE HELEN GOODE	31.10.11
ERAINE ELIZABETH GROTE	31.10.10
CAROLYN HUNTSMAN (01.11.08)	31.10.11
GRAHAM REGINALD IRELAND*	31.10.08
RUTH LAYTON	30.04.09
RICHARD JOHN PERRIGNON	31.10.10
SARAH PRITCHARD	31.10.09
SIMON JAMES RICE, OAM	31.10.11
ANNE SCAHILL	31.10.10
MARGARET MARY SMYTH	31.10.10
STEPHANIE VASS	31.10.10

Non-judicial Members

ZITA ROSE ANTONIOS	31.10.11
MARY ELIZABETH BOLT	31.10.10
MAREE JANE GILL	30.10.11
DENNY GROTH	31.10.11
ELAYNE HAYES	31.10.10
NOEL ARTHUR HIFFERNAN	31.10.11
LYNN MARY HOULAHAN*	31.10.08
DINO KELLEGHAN	31.10.10
ALAN KIRKLAND*	31.07.08
ANTHEA ELISABETH LOWE	31.10.11
LINDA MARILYN MONAGHAN-NAGLE	31.10.10
LAURA CLARE MOONEY *	30.04.09
LOUISE NEMETH DE BIKAL*	30.04.09
MAURICE MICHAEL O'SULLIVAN	31.10.11
HENRY NAN HUNG PAN, OAM *	30.04.09
ANTHONY MICHAEL JOSEPH SCHEMBRI*	30.04.09
JOACHIM SCHNEEWEISS, AM	31.10.10
BETTY LORRAINE WEULE	31.10.10

COMMUNITY SERVICES DIVISION**Divisional Head**

ANNE KATHLEEN BRITTON, Deputy President	11.10.09
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Judicial Members

MARGARET MARY SMYTH	31.10.10
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Non-judicial Members

MARY ELIZABETH BOLT	31.10.10
PHILIP FOREMAN	31.10.10
JANE GOODMAN-DELAHUNTY	31.10.10
JENNIFER GREEN	31.10.08
DENNY GROTH	31.10.10
LYNN MARY HOULAHAN*	31.10.08
MEREDITH MARTIN*	31.10.08
JAN MASON	31.10.10
LINDA MARILYN MONAGHAN-NAGLE	31.10.10
JEANETTE McDONALD MOSS, AM	31.10.11

LEGAL SERVICES DIVISION**Divisional Head**

The Hon. Justice WAYNE ROGER HAYLEN, Deputy President	08.06.11
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Deputy Presidents

MICHAEL RAINSFORD CHESTERMAN	02.10.11
Acting Judge ANGELA JEANNE STIRLING KARPIN*	30.11.08
Acting Judge JOHN McGUIRE	20.09.09

Barrister Members

PAUL EDWIN BLACKET, SC	31.10.09
ROBERT BRUCE SCOTT MACFARLAN, QC*	05.09.08
SHARRON NORTON, SC	31.10.11
LIONEL PHILIP ROBBERDS, QC	31.10.11
WENDY LOUISE ROBINSON, QC	31.10.11
ALISON PATRICIA STENMARK, SC	31.10.09
ROBERTSON WRIGHT, SC	31.10.09

Solicitor Members

MICHAEL JAMES BARNES	31.10.10
CHRISTINE ANNE BISHOP	31.10.09
JOHN WILLIAM FRANCIS BRENNAN, RFD	31.10.09
JOHN SYDNEY CURRIE	31.10.09
JULIE LOUISE GREENWOOD*	31.10.08
SANDRA NERYL HALE	31.10.09
GRAHAM BRIAN MOLLOY	31.10.09
JOHANNA PHEILS	31.10.10
MICHELLE ANNE RIORDAN	31.10.10
CEDRIC BOHRSMANN VASS*	10.10.08

Licensee Members

JANICE LOUISE HEDISON	31.10.10
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Non-judicial Members

CARL DONALD BENNETT	31.10.10
LESHIA OLGA BUBNIUK	31.10.10
MICHAEL EUGENE COSTIGAN*	31.10.08
BARRIE DRUMMOND DYSTER*	31.10.08
ROSS ANDREW EDWARD FITZGERALD	31.10.11
ELAYNE HAYES	31.10.10
ANNETTE FRANCES O'NEILL*	31.10.08
JOHN TINGLE	31.10.10

RETAIL LEASES DIVISION**Divisional Head**

MICHAEL RAINSFORD CHESTERMAN, Deputy President	02.10.11
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Deputy President

PETER RAYMOND CALLAGHAN, SC	31.10.10
Magistrate NANCY LOUISE HENNESSY	07.03.10
ELIZABETH MARGARET OLSSON, SC	29.08.11

Judicial Members

DENNIS BLUTH (01.11.08)	31.10.11
ROBERT JOHN FOX	31.10.11
SIGRID HIGGINS	31.10.10
MARGARET COLLEEN HOLE, AM	31.10.10
GRAHAM BRIAN MOLLOY	31.10.11
STEPHEN HENRY MONTGOMERY	31.10.10
KIM BERESFORD RICKARDS	31.10.09

Non Judicial Members

NEIL FAGG	31.10.10
ROGER KENNETH FAIRWEATHER*	06.01.09
GARTH WARREN GRIFFITHS	31.10.10
BRIAN TERRY HARRISON	31.10.09
ANNETTE FRANCES O'NEILL*	31.10.08
TERENCE JAMES TYLER	31.10.09
ROBERT VAUGHAN WARD	31.10.10
BETTY LORRAINE WEULE	31.10.10

REVENUE DIVISION**Divisional Head**

JANE ANNABEL DARLING NEEDHAM, SC	02.11.11
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Deputy President

ROBIN PATRICK HANDLEY*	31.07.09
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Judicial Members

JULIAN BLOCK	31.10.10
JULIE LOUISE GREENWOOD*	31.10.08
MICHELLE JOSEPHINE HIRSCHHORN	31.10.10
MARGARET COLLEEN HOLE, AM	31.10.10
RICHARD JOHN PERRIGNON	31.10.10
AMARJIT SINGH VERICK	31.10.10

Non Judicial Members

CARL DONALD BENNETT	31.10.10
CLIFFORD DOUGLAS BLAKE, AO	31.10.10
DANNY KOUTOULAS	31.10.10

MEDIATORS

List of Mediators under s 106 of the ADT Act
Appointments have been limited to serving members of the Tribunal.

COMMUNITY SERVICES DIVISION

PENELOPE HELEN GOODE
DENNY GROTH
SIGRID HIGGINS

EQUAL OPPORTUNITY DIVISION, GENERAL DIVISION – GUARDIANSHIP AND PROTECTED ESTATES MATTERS

ZITA ROSE ANTONIOS
LEIGH BAKER
PENELOPE HELEN GOODE
DENNY GROTH
SIGRID HIGGINS
ASHLEY LIMBURY
JILLIAN MOIR
MARGARET MARY SMYTH

GENERAL DIVISION – FREEDOM OF INFORMATION AND PRIVACY MATTERS

ZITA ROSE ANTONIOS
PENELOPE HELEN GOODE
SIGRID HIGGINS
ASHLEY LIMBURY
JILLIAN MOIR

Legend

* Date of resignation

Date of retirement

Appendix C: Legislation

Principal Legislation

Administrative Decisions Tribunal Act 1997
Administrative Decisions Tribunal (General)
Regulation 2004
Administrative Decisions Tribunal Rules 1998

Primary Legislation

Aboriginal Lands Rights Act 1983
Adoption Act 2000
Agricultural Livestock (Disease Control Funding) Act 1998
Agricultural Tenancies Act 1990
Air Transport Act 1964
Animal Research Act 1985
Anti-Discrimination Act 1977
Apiaries Act 1985
Architects Act 2003
Banks and Bank Holidays Act 1912
Births Deaths and Marriages Registration Act 1995
Boxing and Wrestling Control Act 1986
Building and Construction Industry Security of Payment Act 1999
Building Professionals Act 2005
Business Names Act 2002
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
Children and Young Persons (Care and Protection) Regulation 2000
Children's Services Regulation 2004
Chiropractors Act 2001
Coal Mine Health and Safety Act 2002
Coal Mine Health and Safety Regulation 2006
Commercial Agents and Private Inquiry Agents Act 2004
Commission for Children and Young People Act 1998
Community Justices Centres Act 1983
Community Services (Complaints, Reviews and Monitoring) Act 1993
Community Services (Complaints, Reviews and Monitoring) Regulation 2004
Conveyancers Licensing Act 2003
Co-operative Housing and Starr-Bowkett Societies Act 1998
Deer Act 2006
Dental Practice Act 2001
Disability Services Act 1993
Drug and Alcohol Treatment Act 2007
Education Act 1990
Electricity Supply Act 1995
Electricity (Consumer Safety) Act 2004
Entertainment Industry Act 1989
Explosives Act 2003
Fair Trading Act 1987

Firearms Act 1996
Firearms Regulation 2006
First Home Owner Grant Act 2000
Fisheries Management Act 1994
Food Act 2003
Forestry Act 1916
Freedom of Information Act 1989
Freedom of Information Regulation 2005
Game and Feral Animal Control Act 2002
Gas Supply Act 1996
Guardianship Act 1987
Guardianship Regulation 2005
Health Care Complaints Act 1993
Health Records and Information Privacy Act 2002
Hemp Industry Act 2008
Higher Education Act 2001
Home Building Act 1989
Home Building Regulation 2004
Housing Act 2001
Hunter Water Act 1991
Institute of Teachers Act 2004
Impounding Act 1993
Legal Profession Act 2004
Licensing and Registration (Uniform Procedures) Act 2002
Liquor Act 2007
Local Government Act 1993
Marine Safety Act 1998
Mental Health Regulation 2007
Mine Health and Safety Act 2004
Mine Health and Safety Regulation 2007
Motor Dealers Act 1974
Motor Vehicle Repairs Act 1980
Motor Vehicle Sports (Public Safety) Act 1985
Native Title (New South Wales) Act 1994
Non-Indigenous Animals Act 1987
Nurses and Midwives Act 1991
Occupational Health and Safety Act 2000
Occupational Health and Safety Regulation 2001
Ombudsman Act 1974
Optometrists Act 2002
Osteopaths Act 2001
Passenger Transport Act 1990
Pawnbrokers and Second-hand Dealers Act 1996
Pesticides Act 1999
Petroleum Product Subsidy Act 1997
Photo Card Act 2005
Physiotherapists Act 2001
Plant Diseases Act 1924
Podiatrists Act 2003
Police Act 1990
Powers of Attorney Act 2003
Private Health Facilities Act 2007
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 2003
Psychologists Act 2001
Public Health Act 1991
Public Lotteries Act 1996
Rail Safety Act 2008
Racing Administration Act 1998
Registered Clubs Act 1976
Registration of Interests in Goods Act 1986
Retail Leases Act 1994
Rice Marketing Act 1983
Road and Rail Transport (Dangerous Goods) Act 1997
Road Transport (General) Act 2005
Road Transport (Safety and Traffic Management) Act 1999
Security Industry Act 1997
Shop Trading Act 2008
State Water Corporation Act 2004
Surveying Act 2002
Sydney Water Act 1994
Sydney Water Catchment Management Act 1998
Taxation Administration Act 1996 ie
 Betting Tax Act 2001
 Duties Act 1997
 Gaming Machine Tax Act 2001 Health
 Insurance Levies Act 1982 Insurance
 Protection Tax Act 2001
 Land Tax Act 1956
 Land Tax Management Act 1956
 Parking Space Levy Act 1992
 Payroll Tax Act 2007
Timber Marketing Act 1977
Thoroughbred Racing Act 1996
Tow Truck Industry Act 1998
Trade Measurement Act 1989
Trade Measurement Administration Act 1989
Travel Agents Act 1986
Valuers Act 2003
Veterinary Practice Act 2003
Vocational Education and Training Act 2005
Weapons Prohibition Act 1998
Wine Grapes marketing Board (Reconstitution) Act 2003
Wool Hide and Skin Dealers Act 2004
Workers Compensation Regulation 2003
Workplace Injury Management and Workers Compensation Act 1998
Youth and Community Services Act 1973

Appendix D: Case Load and Time Standards

CASE LOAD

	All Divisions			Appeal Panel - Internal		
	Applications Lodged	Applications Completed	Applications Pending#	Appeals Lodged	Appeals Completed	Appeals Pending#
1998-1999*	625**	234	391*	8	2	6
1999-2000	568	619	340*	44	20	30
2000-2001	666	629	377	53	45	38
2001-2002	695	642	430	61	59	40
2002-2003	766	817	379	73	67	46
2003-2004	908	791	496	65	89	21
2004-2005	919	910	505	77	59	39
2005-2006	969	913	561	82	74	47
2006-2007	1009	954	616	80	76	51
2007-2008	989	955	650	83	84	50
2008-2009	990	952	672	75	82	42
Total	9104	8416	(672)	701	657	42

* Date of commencement: 6 October 1998

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

Pending and filed figures have been adjusted following an audit and manual reconciliation of files in 2008.

APPEAL - EXTERNAL

	Appeals Lodged	Appeals Completed	Appeals Pending#
2002-2003*	1	0	0
2003-2004	28	21	8
2004-2005	19	21	6
2005-2006	17	18	5
2006-2007	15	14	6
2007-2008	21	19	8
2008-2009	20	22	4
Total	120	115	4

*External appeals jurisdiction commenced – 28 February 2003

TIME STANDARDS

As at 30 June 2009 the Tribunal's performance against its time standards was:
(target appears in brackets)

Review decisions

57% of matters disposed of in less than 6 months (85%)

82% of matters disposed of in less than 1 year (100%)

Clearance ratio* – 94%

Original Decisions (other than Equal Opportunity Division matters)

67% of matters disposed of in less than 6 months (85%)

86% of matters disposed of in less than 1 year (100%)

Clearance ratio* – 98%

Original Decisions (Equal Opportunity Division matters)

90% of matters disposed of in less than 1 year (80%)

97% of matters disposed of in less than 2 years (100%)

Clearance ratio* – 85%

Professional Disciplinary Decisions (includes Legal Services Division and General Division cases)

36% of matters disposed of in less than 9 months (90%)

51% of matters disposed of in less than 1 year (100%)

Clearance ratio* – 150%

Appeals (Internal Appeals from appealable decisions of the Tribunal and External Appeals)

64% of matters disposed of in less than 6 months (80%)

98% of matters disposed of in less than 1 year (100%)

Clearance ratio* – 95%

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

Appendix E: Statistics

GENERAL DIVISION 1/7/2008 - 30/6/2009

1. Case flow 2008-2009

Matters pending at 30 June 2008	New Applications filed	Disposals	Pending as at 30 June 2009
252	357	384	225

* Adjustment made to 252 to rectify a previous error (from 255)

2. Applications by type 2008-2009

Applications for Original Decision	Applications for review	Professional Discipline
3	354	0

3. Applications by Act 2008-2009

Subject by Act	
Births Deaths and Marriages Registration Act 1995	1
Building Professionals Act 2005	3
Business Names Act 2002	5
Commercial Agents & Private Inquiry Agents Act 2004	2
Conveyancers Licensing Act 2003	1
Education Act 1990	1
Fair Trading Act 1987	1
Firearms Act 1996	25
Fisheries Management Act 1994	2
Food Act 2003	1
Freedom of Information Act 1989	104
Game and Feral Animal Control Act 2002	1
Guardianship Act	8
Health Records and Information Privacy Act 2002	12
Home Building Act 1989	16
Liquor Act 2007	1
Local Government Act 1993	4
Motor Dealers Act 1974	1
Occupational Health and Safety Act 2001	3
Passenger Transport Act 1990	66
Pawnbrokers & Second Hand Dealers Act 1996	1
Privacy and Personal Information Protection Act 1998	33
Property Stock and Business Agents Act	11
Protected Estates Act 1983	9
Security Industry Act 1997	33
Shop Trading Act 2008	1
Tow Truck Industry Act 1989	7
Transport Administration Act 1988	1
Valuers Act 2003	1
Vocational Education and Training Accreditation Act 2005	3

4. Outcomes in Review matters 2008-2009

Dismissed because application withdrawn/no appearance/agreement reached	Decision under review affirmed	Decision under review set aside/ varied/remitted/ recommendation made	Mixed result - Partly Affirmed/ Partly set aside varied or remitted	Privacy - contravention - no action	Privacy - contravention order made	Privacy - application dismissed	No Jurisdiction
219	92	36	7	0	3	2	20

5. Outcomes in Original matters 2008-2009

Dismissed because application withdrawn/no appearance/ agreement reached	Application granted	Application refused	No Jurisdiction
0	1	0	1

6. Outcomes in Professional Discipline 2008-2009

Dismissed	Orders made	Application withdrawn dismissed	No jurisdiction
0	3	0	0

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

No. disposed of in under 6 months	239
No. disposed of in under 12 months	76
No. disposed of in over 12 months	54
No. disposed of in over 2 years	15
	384

8. Mediation

No. of disposals where mediation was conducted		10
Settled at Mediation	Settled after Mediation	Proceeded to Hearing
2	4	4

Guardianship and Protected Estates List 1/7/2008 - 30/6/2009

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 below. 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 2008-2009

Pending as at 30 June 2008	New Applications Filed	Disposals	Pending as at 30 June 2009
11	17	22	6*

* incorrect figure of 10 in 2007-2008

2. Applications for Review by Act 2008-2009

Subject by Act	Number
Guardianship Act	8
Protected Estates Act	9

3. Outcomes in Review Matters under the Guardianship Act and the Protected Estates Act 2008-2009

Dismissed because application withdrawn/ no appearance/ agreement reached	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	Total
12	4	6	0	0	22

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

No. disposed of in under 6 months	16
No. disposed of in under 12 months	6
No. disposed of in over 12 months	0
No. disposed of in over 2 years	0

COMMUNITY SERVICES DIVISION 1/7/2008 – 30/6/2009

1. Case flow 2008-2009

Matter pending as at 30 June 2008	New Applications filed	Disposals	Pending as at 30 June 09
14	46	36	24

2. Applications by type 2008-2009

Applications for original decision	Applications for review
16	30

3. Applications by Act 2008-2009

Subject by Act	Number
Children and Young Persons (Care and Protection) Act 1988	30
Commission for Children and Young People Act 1998	16

4. Outcomes – Reviewable Decisions 2008-2009

Dismissed because application withdrawn/no appearance/agreement reached	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
15	2	1	0	1

5. Outcomes– Original Decisions 2008-2009

Dismissed because application withdrawn/no appearance/agreement reached	Declaration Made	Declaration Refused	No Jurisdiction
10	2	3	2

6. Mediation 2008-2009

No. of disposals where mediation was conducted	Settled at Mediation	Settled after Mediation	Proceeded to Hearing
5	4	1	0

7. Timeliness – time from date of application to date of disposal

No. disposed of in under 6 months	31
No. disposed of in under 12 months	2
No. disposed of in over 12 months	3
No. disposed of in over 2 years	0

EQUAL OPPORTUNITY DIVISION 1/7/2008 – 30/6/2009

1. Case flow 2008– 2009

Matters pending at 30 June 2008	New Applications filed	Disposals	Pending as at 30 June 09
100	140	115	125

2. Applications by type 2008-2009

Referrals of complaints by President of Anti-Discrimination Board	Application for registration of conciliation agreement	Applications for leave to proceed	Applications for interim orders
107	2	27	4

3. Referrals of Complaints by President of Anti-Discrimination Board by Ground 2008-2009

Head of discrimination**	Number
Race	37
Disability Discrimination	45
Sexual Harassment	15
Sex Discrimination	25
Victimisation	18
Carers responsibilities	9
Age Discrimination	12
Homosexual vilification	3
Homosexual Discrimination	2
Homosexual Victimisation	1
Marital status	1
Racial Vilification	3

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

4A. Outcomes of Referrals 2008-2009

Dismissed because application withdrawn/no appearance/agreement reached	Summary dismissal under section 111,s 102	Dismissed after hearing	Orders made
76	18	14	7

4B. Mediation

No. of disposals where mediation was conducted	Settled at Mediation	Settled after Mediation	Proceeded to Hearing
36	17	16	3

4C. Timeliness – time from date of application to date of disposal

for referrals	
No. disposed of in under 6 months	65
No. disposed of in under 12 months	31
No. disposed of in over 12 months	15
No. disposed of in over 2 years	4

5A. Application for registration of conciliation agreement 2008 – 2009

(this information also forms part of the Equal Opportunity Division case flow statistics above)

Matters pending at 30 June 2008	New Applications filed	Disposals	Pending as at 30 June 09
2	2	4	0

5B. Outcome of application for registration of agreement 2008-2009

Agreement registered	Agreement not registered	Dismissed because application withdrawn / no appearance/ agreement reached
1	0	3

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

for registration of agreement

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

6A. Applications for leave to proceed 2008-2009

(this information also forms part of the Equal Opportunity Division case flow statistics above)

Matters pending at 30 June 2008	New applications filed	Disposals	Pending at 30 June 2009
12	27	36	3

6B. Outcome of applications for leave 2008-2009

Leave granted	Leave not granted	Dismissed because application withdrawn / no appearance/ agreement reached
9	16	11

6C. Timeliness - time from date of application to date of disposal

for leave applications

No. disposed of in under 6 months	30
No. disposed of in under 12 months	5
No. disposed of in over 12 months	1
No. disposed of in over 2 years	0

7A. Applications for interim orders

New Applications Filed	Disposals
4	4

7B. Outcome of applications for interim orders

Order granted	Order not granted	Consent orders	Application withdrawn dismissed
0	0	1	3

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

for interim orders

No. disposed of in under 6 months	4
No. disposed of in under 12 months	0
No. disposed of in over 12 months	0
No. disposed of in over 2 years	0

RETAIL LEASES DIVISION 1/7/2008 – 30/6/2009

1. Case flow 2008-2009

Matters pending at 30 June 2008	Applications filed	Disposed	Pending as at 30 June 09
129	255	242	142

2. Applications by Type 2008-2009

Retail tenancy claim	143
Unconscionable conduct claim	2
Combined retail tenancy & unconscionable conduct claim	52
Specialist Retail Valuer	58

3. Outcomes 2008- 2009

Dismissed because application withdrawn / no appearance/ agreement reached	Dismissed after hearing	Settled – Orders made	Orders made	No Jurisdiction	Transfer to Supreme Court
157	7	15	56	5	2

4. Timeliness – time from date of application to date of disposal

No. disposed of in under 6 months	160
No. disposed of in under 12 months	51
No. disposed of in over 12 months	25
No. disposed of in over 2 years	6

REVENUE DIVISION 1/7/2008- 30/6/2009

1. Case flow 2008-2009

Matters pending at 30 June 2008	Applications filed	Disposals	Matters pending as at 30 June 09
88	161	126	123

2. Applications by Type 2008-2009*

Subject by Act	
Duties Act 1997	10
First Home Owners Grant Act	23
Land Tax Act	5
Land Tax Management Act 1956	83
Parking Space Levy Act 1992	2
Payroll Tax Act 1971	31
Payroll Tax Ac 2007	1
Taxation Administration Act 1996	6

3. Outcomes 2008- 2009

Dismissed because application withdrawn/ no appearance/ agreement reached	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
89	31	2	3	1

4. Timeliness – time from date of application to date of disposal

No. disposed of in under 6 months	35
No. disposed of in under 12 months	87
No. disposed of in over 12 months	4
No. disposed of in over 2 years	0

LEGAL SERVICES DIVISION 1/7/2008 - 30/6/2009

1. Case flow 2008-2009

Matters pending at 30 June 2008	Applications filed	Disposed	Pending as at 30 June 09
51	31	49	33

2. Applications by type 2008-2009

Applications for original decision	0
Applications for review	1
Application for professional discipline	30

3. Applications by subject 2008-2009

Type of Practitioner	Type of conduct	Number
Barrister	Disciplinary action	3
Solicitor	Show Cause s.75	0
Solicitor	Disciplinary action	24
Solicitor	Reprimand/Compensation Order s.540	1
Lay associate	Approval of lay associate s. 17(3)	1
Lay associate	Prohibition on employment s.18	2

4. Outcomes in Original matters 2008-2009*

<i>Disciplinary - Penalty imposed by type</i>	
Dismissed after hearing	3
Fined	12
Reprimanded	17
Practising Certificate suspended	1
Practising Certificate cancelled	6
Removed from Roll	20
Consent order	4
Conditions imposed on practising certificate	8
Compensation	0
Undertake and complete course of further Legal Education	7
Withdrawn	0
Application granted	1
Application refused	0
Approval of lay associate	0
Application granted	10
Withdrawn	1

*NB: a number of matters have more than one outcome

5. Outcomes in Review matters 2008-2009

Application withdrawn/ Dismissed	1
Decision under review affirmed	1
Decision under review set aside/varied/remitted/recommendation made	0

6. 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	17
No. disposed of in over 12 months	12
No. disposed of in over 2 years	11

APPEALS 1/7/2008 – 30/6/2009

Internal Appeals to Appeal Panel

1. Case Flow 2008 –2009

	Appeals Pending as 30 June 2008	New Appeals filed	Disposals	Pending as at 30 June 09
General Division	30	41	49	22
Community Services Division	0	0	0	0
Equal Opportunity Division	3	15	11	8
Retail Leases Division	12	12	16	6
Revenue Division	5	7	6	6
Total	50	75	82	42

2. Outcome of Internal Appeals 2008 – 2009

	Upheld (in full or part)	Dismissed	No Jurisdiction	Consent Orders	Withdrawn/ Discontinued	Total
Discontinued Total						
General Division	20	20	0	2	7	49
Community Services Division	0	0	0	0	0	
Equal Opportunity Division	5	3	1	2	0	11
Retail Leases Division	7	6	0	1	2	16
Revenue Division	4	2	0	0	6	6
Legal Services Division	0	0	0	0	0	
Total						82

3. Timeliness – time from date of appeal to date of determination

No. disposed of in under 6 months	46
No. disposed of in under 12 months	27
No. disposed of in over 12 months	6
No. disposed of in over 2 years	3
	82

External Appeals to the Appeal Panel

1. Case Flow 2008 –2009

	Appeals Pending as 30 June 2008	New Appeals filed	Disposals	Pending as at 30 June 09
Guardianship Tribunal	6	19	22	3
Mental Health Review Tribunal	0	1	0	1
Magistrate	0	0	0	0
Total	6	20	22	4

2. Outcome of External Appeals 2008–2009

Upheld (in full or in part)	Dismissed	Withdrawn/Discontinued	No Jurisdiction
8	5	9	0

3. Timeliness –time from date of application to date of disposal

No. disposed of in under 6 months	16
No. disposed of in under 12 months	5
No. disposed of in over 12 months	1
No. disposed of in over 2 years	0

Appeals to the Supreme Court

1. Case flow 2008 - 2009

	Appeals Pending as 30 June 2008	New Appeals filed	Disposals	Pending as at 30 June 2009
General Division	2	3	3	2(1)
Community Services Division	3	0	0	0
Equal Opportunity Division	1	2	2	1
Retail Leases Division	2	2	0	0
Revenue Division	0	0	0	0
Legal Services Division	1	3	1	6 (3)
Appeal Panel	17	7	7	17 (8)
Appeal External	1*	1	2	1
Total	26	18	15	

* adjusted from 0

2. Outcome of Appeals 2008 - 2009

	Upheld (in full or part)	Dismissed	Withdrawn/ Discontinued	Orders made following s118 referral
General Division	2	1	0	0
Community Services Division	0	0	0	0
Equal Opportunity Division	2	0	0	0
Retail Leases Division	0	0	0	0
Revenue Division	0	0	0	0
Legal Services Division	1	0	0	0
Appeal Panel	5	2	0	0
Appeal External	1	1	0	0
Total	11	4	0	

Published Appeal Decisions- Presiding Member

Member	Number- Internal Decisions	Number- External Decisions	Total
O'Connor, P	34	0	34
Hennessy, DP	19	7	26
Chesterman, DP	14	0	14
Needham, DP	4	0	4
Handley, DP	2	4	6
Britton, DP	3	3	3

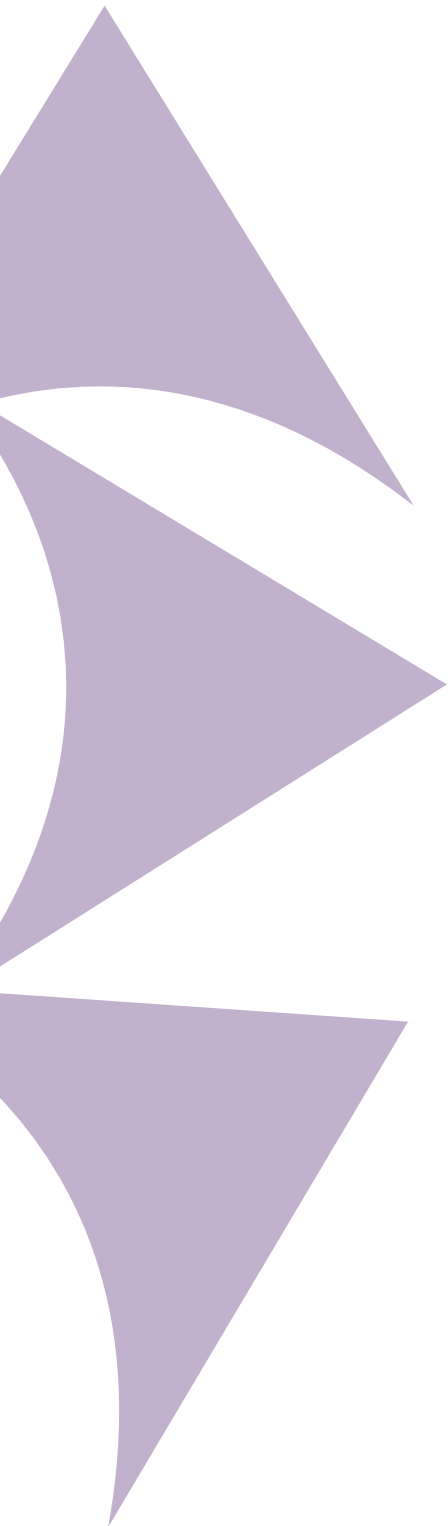
Appendix F: Advisory Bodies

User Groups

FOI User Group. President, Full-time Deputy President, Judicial Member assigned to General Division, FOI and Privacy List. Representatives from Crown Solicitor's Office, NSW Ombudsman, NSW FOI and Privacy Officers Network, Public Interest Advocacy Centre.

Privacy User Group. President, Full-time Deputy President, Judicial Member assigned to General Division, FOI and Privacy List. Representatives from Crown Solicitor's Office, NSW Privacy Commissioner, NSW FOI and Privacy Officers Network, Public Interest Advocacy Centre.

Guardianship and Protected Estates User Group. President, Full-time Deputy President, Non-Judicial Member assigned to this List. Representatives from Office of Protective Commissioner and Office of Public Guardian, the Guardianship Tribunal, Mental Health Review Tribunal, Chief Magistrate's Office, Crown Solicitor's Office, Legal Aid Commission, LawAccess NSW, Intellectual Disability Rights Service, Aged Care Rights Service.



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