

COAT NEWS

NEW SOUTH WALES

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Volume 1
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Convenor's Corner

This is December 2017 Vol 1 Issue 2.

Since our last edition COAT NSW, in conjunction with COAT National, held a very successful conference at the new International Convention Centre in Darling Harbour on 8 and 9 June. The theme of the conference was '*Tribunals: Enablers of Justice*'. Feedback from attendees was that the daytime content was highly relevant and that our dinner speaker, Ms Fay Jackson, Deputy Commissioner of the Mental Health Commission (NSW) was thought provoking. Many thanks to our Vice Convenor, Anina Johnson, and the conference sub-committee, for ensuring the success of this event. The 2018 COAT NSW Conference will be held on Friday 7 September so please mark your diaries now.

The annual Whitmore lecture, in honour of the legacy of the late Professor Harry Whitmore, was held on 17 October 2017. We were very grateful that the Hon Justice John Basten of the Court of Appeal accepted our invitation to give this year's lecture. His Honour's lecture was on the topic of "*Separation of Powers – Dialogue and Deference*."

In this edition, Walkley award winning journalist, Debra Jobson, continues her series on life behind the scenes in Tribunals. On this occasion Debra has provided us with an in depth profile piece on the President of the Administrative Appeals Tribunal (AAT), Justice David Thomas.

We are fortunate once again to be able to provide in this edition a series of case notes which I trust you find of interest. Thank you to Justice Wright, President of NCAT, and his tipstaff, Mr Justin Pen for providing us with all case notes we have published this year.

The 4th edition of the COAT Manual is now available for purchase (<http://www.coat.gov.au>). An invaluable guide on practice and procedure, the Manual is an extremely handy resource for those curly issues that can arise, often without warning, such as the rule against bias and contempt.

Finally, I wish to thank you for continuing to support the activities of COAT NSW and wish you and your loved ones Seasons Greetings and, a restful break, on the perhaps incorrect assumption you are having one!

Malcolm Schyvens
COAT Convenor

In Profile: Justice David Thomas

by Debra Jopson

As the rain tumbles over the slice of Sydney Harbour which is seen through his corner office window, Justice David Thomas, the new national head of Australia's tribunal system, apologises for the modesty of his black socks and shoes.

Just a few months into his seven-year appointment as president of the Administrative Appeals Tribunal, he's flown down from his hometown of Brisbane the night before for talks with staff and stakeholders as he beds down the merger between the general, migration and social security divisions.

On the plane, he's read a profile in this journal about another judge who wears brightly coloured socks and he's suffered a small flash of regret over the restrained clothing palette he's packed.

He points to his yellow patterned tie and blue-checked shirt as Exhibit A, explaining that he's done his best under the circumstances. The humour is understated.

In fact, with his neat thatch of dark hair, rimless glasses and penchant for speaking at a clip, much about Thomas, a former commercial solicitor elevated to the bench four years ago, seems understated.

But he's a man who genuinely loves the ballet and he has an eye for a show. Most famously, among Brisbanites, for the Ekka, which he has helped shape as president of the agricultural association which runs it. At the Ekka, the country comes to town yearly, with competitions ranging, as he says, "from stud bulls to fruit cake to cookery and poultry..."

A doctor's son from Brisbane's south-side, he has no rural background, but contests like the wood chopping still give him a thrill.

He marvels that sometimes four generations appear at one show and at the virtuosity of axemen shimmying up a tree before chopping it down.

"You just think about the intense cardiovascular activity that they have over a period of a few minutes...They're very athletic people," he says.

He joined the council of the Royal National Agricultural and Industrial Association of Queensland (the RNA) some years ago to lend his business acumen.

Six years ago he became president and the RNA embarked on making Brisbane's showground site which was "then the biggest brownfield development in the country," costing \$5 billion. When he became a judge, he stepped back from the commercial side.

At Thomas' swearing-in as the 115th judge (but only the fourth solicitor) appointed to the Queensland Supreme Court, then Attorney-General Jarrod Bleijie referred to his role as a councillor overseeing the wood-chopping contest.

"It has been said to me - perhaps in jest - that wood-chopping is not dissimilar to the daily grind of a judge," Bleijie said.



"It has been said to me - perhaps in jest - that wood-chopping is not dissimilar to the daily grind of a judge," Bleijie said.

Thomas enjoys being a judge and jokes: “Given that we all have wonderful physiques, maybe that's a comparison that he's making.”

As AAT president, he's kept his roles at RNA and deputy chair of the Queensland Ballet. He believes judicial officers should “stay in touch.”

He also remained the deputy Chancellor of the Anglican Archdiocese of Brisbane. The church offered him the role when its Chancellor Paul de Jersey became state Governor three years ago. The deputy, Justice Debra Mullins, took de Jersey's position and Thomas stepped into her shoes.

“I think lawyers are lucky people and they should try and put something back into the community if they can,” he says.

He and his wife Jane are patrons of various arts organisations and he has been a member of a board advising the state government on how to spend its arts funding. This, the RNA role and his position as a senior partner of Minter Ellison made him a quiet power in his hometown.

In 2012, *The Courier-Mail* named him one of the “top 50 most influential people in Queensland” as a “business confidante and adviser”.

“I couldn't quite understand that,” he says. And then he muses that with over 30 years' experience in commercial litigation and dispute resolution, perhaps he has been a confidante, holding in trust the secrets of some of the most influential Queenslanders.

Thomas - who moved to the AAT after four years as Queensland Civil and Administrative Tribunal (QCAT) president - says he neither harbours political ambitions, nor has he ever sought to invest in commercial transactions. Lawyers, he says, are better at advising on risks than taking them.

And judges must maintain their independence in decision making.

This was crucial during the Queensland legal system's rocky years of 2013 to 2015 during which the state's controversial Chief Magistrate Tim Carmody became the Supreme Court Chief Justice.

The Bar Association president quit over the appointment, prominent legal figures criticised it and one judge announced she could not sit with Carmody on any court, due to alleged issues of bias.

“During the whole of the upheaval, judges continued to do their job. That was something that people didn't fully appreciate. The court in Queensland wasn't falling apart. It was doing a magnificent job,” he says.

During this time, while there were concerns over the independence of the state's legal institutions the public continued to be served, he says.

“To a person who wanted to achieve justice out of a situation, it was very much business as usual,” he says.

In mid-2015, Carmody resigned as Chief Justice. Some commentators believed he had negotiated a deal with the Government to follow Thomas as QCAT president when his tenure ended last year.

Carmody was not made President, but rather, a supplementary member of QCAT. Thomas says he played no role in that. Thomas was subsequently re-appointed QCAT president.

“I think lawyers are lucky people and they should try and put something back into the community if they can,” he says.

As with the courts, he believes the AAT will thrive through its staff and members maintaining its independence and ethic.

“The AAT has, in my experience, really dedicated top-quality people who are discharging large workloads because they have a high sense of responsibility,” he says.

Some decisions made within the migration division have been under political and media attack recently. Thomas doesn't mention that, but he says he has “the greatest admiration for the people who work in the migration area. I think it's actually the hardest thing in the whole tribunal to do.”

Decision-makers often conduct hearings with no Immigration Department representation, must ask all the questions, cover all relevant issues, give warnings about what they will take into consideration and then make decisions against the background of a procedural code, he explains.

The division's caseload grew 42 per cent last year.

“We're trying to find ways to deal with that increase in volume,” he says.

The tribunal system connects citizens to the justice system at a basic level and the AAT was the trailblazer in that it “is really giving citizens the right to be heard and the right to effectively get their decisions by administrators reviewed,” he says.

Previously, those aggrieved had to use an old system of writs to challenge public officers' acquittal of their duties.

The AAT and other tribunals around Australia have led the way on dispute resolution and the courts have followed, he says.

When he first started out as a solicitor in 1979, he acted for the Uniting Church in a dispute with the Presbyterian Church over their merger. The parties resolved their differences and Thomas has striven for such agreed outcomes ever since.

“People talk about a win-win. There's very rarely ever a win-win. There's a compromise-compromise. But if you've had a compromise, then that's your compromise. You own it. It's something you've agreed to, whereas if you get an imposed decision and you firmly believe it's wrong, then it's going to be something that never really sorts itself out [in your mind],” he says.

He enjoys the cut and thrust of hearings and plans to sit on the Federal Court where he can.

“I'm a person who started off not expecting to be a judge in either the Supreme

Court or the Federal court” he says.

As AAT president, he is following the example of his predecessor Duncan Kerr (whom he admires) choosing the most significant cases on which to sit.

Two of his first include a dispute over the Federal Government's environmental management fees for Great Barrier Reef visitors which affects tourist operators and Adelaide hearings about pelvic mesh, a gynaecological medical device.

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Thomas thrives on the variety. Early in his career, as a maritime law specialist he “arrested ships” all over the world. Papers are no longer “nailed to the mast” of vessels which have a liability against them. They have to be stuck, he explains.

“In my first admiralty case, I arrested three ships in Darwin. They were in the Darwin Harbour for a long time,” he recalls.

Thomas is no sea dog himself, but he has been chairman of the Queensland Maritime Museum.

“Museum collections are fascinating... People bring in the most amazing things,” he says.

One example was a telescope which could possibly have been used by the British naval commander Lord Nelson. Whittling away at the provenance, museum staff came close to proving it, but not close enough.

“It'd be very interesting to be a curator or a general manager of one of those museums because of the type of work you do. It's amazing,” Thomas says wistfully.

“Cultural tourism is very important for any city. The liveability of the city is dependent on the arts and we've got a really great cultural precinct at Southbank now.”

He loves speaking of the city. A Brisbane boy? “Through and through,” he agrees.

It's another rainy day, this time in Brisbane and Thomas is working from his northside home, with his Chinese Crested toy dog as his companion. The family has three Australian shepherds, after years of successfully showing Rough Collies, the same breed as the famous “Lassie.”

“Everyone should have a dog,” he declares.

He also enjoys the Queensland Ballet's athletic offerings. He calls artistic director Li Cunxin - famously “Mao's Last Dancer” - “an inspirational individual.”

“The Ballet's been through massive growth. It's so exciting to be part of it and to watch the season tickets increasing every year,” he says.

But Thomas' own athleticism is mostly intellectual.

Once, responding to a joking suggestion that there should be a competition between RNA councillors and axemen, he quipped he would nominate Tasmanian-born world champion David Foster as his substitute.

“I'd probably chop my foot off. There'd be workplace health and safety issues. The axes are incredibly sharp,” he says.

At 62, he favours something more modest on weekends. He likes to take a walk of about five kilometres in the morning cool with Jane. Then breakfast out.

The case notes in this edition have generously been provided by the NSW Civil and Administrative Tribunal. The COAT NSW Committee kindly thanks NCAT for its assistance in making these case notes available to our membership.

Court of Appeal of Victoria

Food and Beverage Australia Ltd v Andrews [2017] VSCA 258

In brief: The Victorian Court of Appeal considered the principles relevant to the appellate review of findings of fact (at [92]-[94]) and the obligation to give adequate reasons for decision (at [204]-[210]).

In relation to the role of an appellate court in reviewing findings of fact, the Court held that:

“[92] The law governing the appellate review of findings of fact made at trial was recently set out by the High Court in *Robinson Helicopter Co Inc v McDermott*:

A court of appeal conducting an appeal by way of rehearing is bound to conduct a ‘real review’ of the evidence given at first instance and of the judge’s reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge’s findings of fact unless they are demonstrated to be wrong by ‘incontrovertible facts or uncontested testimony’, or they are ‘glaringly improbable’ or ‘contrary to compelling inferences’.

The Court also held that an appellate body must take into account the advantages possessed by a trial judge who has seen or heard witnesses, stating:

[93] In conducting the ‘real review’ required of it, this Court must bear in mind that it has not seen or heard the witnesses and must respect the advantages that this gave the trial judge. However, the Court cannot rely on this consideration as a basis for avoiding conducting the necessary review....

In relation to the obligation of a court to give adequate reasons for its decisions, the Court held that (footnotes omitted):

“[204] This Court recently observed that the provision of a court’s reasons for judgment serves at least four purposes:

- (a) the reasons enable the parties to see the extent to which their respective arguments have been understood and addressed, and to perceive the basis for the court’s decision;
- (b) the giving of reasons enhances judicial accountability, both in the case itself and more widely;
- (c) the publication of reasons enables practitioners, legislators and members of the public to ascertain the state of the law and the basis upon which like cases will probably be decided in the future; and

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(d) reasons enable an appellate court to determine whether the decision was affected by appealable error.

...

[207] If the reasons are deficient, such that steps in the reasoning process are not revealed, an appellate court will ordinarily be driven to conclude that there is a substantial risk that the fact-finding task miscarried.”

The Court also observed that a delay in giving judgment can diminish the advantage that a trial judge has over an appellate court, in relation to the evaluation of witnesses’ credibility and, furthermore, may contribute to the infirmity of a decision, holding that (footnotes omitted):

“[208] ... Delay in giving judgment can weaken the usual advantage which a trial judge has over an appellate court in evaluating the credit of witnesses, and this must be taken into account on appeal. That problem may be alleviated where the judge has demonstrated in the reasons that the delay did not weaken the trial judge’s advantage (for example, by explaining that contemporaneous notes were relied upon). This may well require the trial judge to deal with the evidence, and especially matters of credit, more extensively than would otherwise be the case.

[209] The problems associated with delay go further. The Full Court of the Federal Court explained in *Expectation*:

The problem is not restricted to fading memory. A judge who comes to make an inordinately delayed decision will inevitably be subjected to great pressure to complete and publish the judgment. A conscientious judge could not but feel that pressure. It is almost inevitable that there will also be some form of external pressure — whether from the parties, the management of the Court, the press or parliamentarians. That pressure could well unconsciously affect the process of decision-making and the process of giving reasons for decision. The decision that is easiest to make and express will have great psychological attraction. As was recently said by the Western Australian Court of Appeal in *Mount Lawley Pty Ltd v Western Australian Planning Commission* [(2004) 29 WAR 273], in the course of a valuable review of the significance of delay in the delivery of judgments (at [31]):

... a long delay can give rise to disquiet ... because of the suspicion, on the part of the losing party, that the task may have become too much for the trial Judge and that he or she had been unable, in the end, to grapple adequately with the issues.

[210] Notwithstanding these dangers, delay itself is not a ground of appeal. The ground of appeal is the error, or the infirmity of the decision, to which the delay may have contributed

“A judge who comes to make an inordinately delayed decision will inevitably be subjected to great pressure to complete and publish the judgment.”

New South Wales Civil and Administrative Tribunal Appeal Panel Decisions

Mendonca v Tonna [2017] NSWCATAP 176

The Appeal Panel allowed an appeal from the Tribunal below, to the extent that the Appeal Panel varied the Tribunal's original order to award costs "on an indemnity basis" to an order that costs are to be awarded "on the ordinary basis" (at [66]). In doing so, the Appeal Panel considered the factors relevant to granting an award for indemnity costs (at [58]-[66]).

As a starting point, the Appeal Panel observed (at [59]) that "indemnity costs are only awarded in limited circumstances":

"... The discretion to do so must be the subject of careful reasoning (*Degmam Pty Ltd (In Liq) v Wright (No 2)* [1983] 2 NSWLR 354) and caution should be exercised in making such an award: *Leichhardt Municipal Council v Green* [2004] NSWCA 341; *Ng v Chong* [2005] NSWSC 385 at [13]."

The Appeal Panel identified the following circumstances as potential bases for an award of indemnity costs:

- 1) Where a case is commenced or continued where there is no chance of success (at [60]);
- 2) Where the proceedings amount to an abuse of process (at [62]);
- 3) Where a party has engaged in unreasonable conduct (at [63]); and
- 4) Where there has been misconduct of a serious nature (at [64]).

The Appeal Panel's full observations on these circumstances are extracted below:

"[60] Other than in relation to the unreasonable refusal of a genuine offer of settlement, one circumstance in which indemnity costs may be awarded is when a case is commenced or continued where there is no chance of success (*Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2)* [2009] NSWCA 12 at [4]), such as where the claim is "without substance", "groundless", "fanciful or hopeless" or so weak as to be futile, such as where a limitation period is obviously at an end: *Hillebrand v Penrith Council* [2000] NSWSC 1058. However, mere weakness of a case will not be sufficient to warrant an exercise of the discretion to award indemnity costs: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534.

[62] Another circumstance which may warrant an order for costs on an indemnity basis is where the proceedings amount to an abuse of process: *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359 at 362. Examples of abuse of process include where the proceedings are commenced other than in good faith or for an ulterior or collateral purpose: *Palmer v Gold Coast Newspapers Pty Ltd* [2013] QSC 352; *Packer v Meagher* [1984] 3 NSWLR 486 at 500. Regardless of whether there is in fact a residential tenancy agreement between the parties, we are not satisfied that Dr Mendonca's applications either individually or collectively were made in bad faith or amount to an abuse of process.

"... one circumstance in which indemnity costs may be awarded is when a case is commenced or continued where there is no chance of success ..."

“Disregard of court orders may justify an indemnity costs order ... Perverse persistence by an unrepresented litigant with a hopeless application may also do so ...”

[63] An award of indemnity costs may also be made for unreasonable conduct. Such conduct may include unnecessarily prolonging the proceedings, (*Degmam Pty Ltd (in liq) v Wright* (No 2), at 358); unfounded allegations of fraud or improper conduct (*Maule v Liporoni* (No 2) (2002) 122 LGERA 216 at 229); deliberate or high-handed conduct (*Rouse v Shepherd* (No 2) (1994) 35 NSWLR 277) and behaviour which causes unnecessary anxiety, trouble or expense, such as the failure to adhere to proper procedure (*FAI General Insurance Co Ltd v Burns* (1996) 9 ANZ Ins Cas 61- 384). Disregard of court orders may justify an indemnity costs order (*O’Keefe v Hayes Knight GTO Pty Ltd* [2005] FCA 1559 at [35]). *Perverse persistence by an unrepresented litigant with a hopeless application may also do so: Rose v Richards* [2005] NSWSC 758.

[64] Misconduct of a serious nature, such as fraud, perjury, contempt or dishonest conduct may also justify costs being awarded on an indemnity basis: *Berkeley Administration Inc v McClelland* [1990] FSR 565 at 568–569; *Ivory v Telstra Corporation Ltd* [2001] QSC 102); *Vance v Vance* (1981) 128 DLR (3d) 109 at 122.”

Astley v J H Properties Pty Ltd [2017] NSWCATAP 181

The Appeal Panel dismissed an appeal from the Consumer and Commercial Division of the Tribunal, holding that there were no relevant grounds to set aside consent orders made by the Tribunal below.

As a starting point, the Appeal Panel observed (at [26]) that a consent order may be set aside in certain circumstances, applying the Appeal Panel’s holding in *Prenc v Stojcevski* [2016] NSWCATAP 244 at [43]–[44]:

“A consent order can properly be described as an order which expresses an agreement in a more formal way than usual and can be set aside on any basis upon which the underlying agreement could be set aside: *Taheri v Vitek* (2014) 87 NSWLR 403; [2014] NSWCA 209 at [71]. In *Harvey v Phillips* (1956) 95 CLR 234; [1956] HCA 27, Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ stated, at 243 –4:

“The question whether the compromise is to be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence or the like. ... [T]here is a dictum of Lindley L.J. which is distinct enough: “... nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud but upon any grounds which invalidate the agreement it expresses in a more formal way than usual To my mind the only question is whether the agreement on which the consent order was based can be invalidated or not. Of course if that agreement cannot be invalidated the consent order is good”: *Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd* [(1895) 2 Ch 273 at 280].”

It might be noted that the High Court in that case refused to set aside the compromise despite the “very unwilling and ephemeral character of the consent which the plaintiff was led to give.” The High Court in this regard said, at 244:

“But it is enough if she expressed a real intention to consent, even if experience might have suggested that it was an attitude she was not likely to maintain. In the circumstances one might have expected that she would be asked to sign a written authority. But that was not done. However the finding of the Supreme Court, supported as it is by evidence, suffices to establish that she definitely did give her authority, however reluctant it may have been. It is impossible to regard the authority she thus gave as insufficient to support the compromise. The issue is one which must be considered from the defendants’ point of view as well as from hers.” (par 43 and 44)”

The Appeal Panel then considered (at [27]) the principles relevant to whether a consent order can be set aside, summarised in *McDonald v McDonald* [2016] NSWCATAP 252 at [59], as follows:

- “(1) At common law, a consent order may be set aside on the same basis as the underlying agreement may be set aside;
- (2) Whether the agreement constituting the compromise can be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence and the like;
- (3) In order to set aside a consent order on one of the above bases, it must be possible to point to some contumelious conduct on behalf of the respondent for instance:
 - (a) with respect to duress, it must be shown that illegitimate pressure was placed on the appellant such that there was no reasonable alternative but for her to submit;
 - (b) with respect to undue influence, not only must there be a source of power to deprive the other person of free and voluntary consent, but it must be shown that the agreement was the result of the actual influence;
- (4) With respect to mistake:
 - (i) the misapprehension must arise in relation to a fact, law or circumstances that affects the substance of an obligation or the mistaken party’s motives for entering into the contract;
 - (ii) a common mistake arises when the mistaken belief is held by both parties;
 - (iii) a unilateral mistake is where one party is mistaken but where there are no other vitiating circumstances, such as misleading or deceptive conduct, fraud or misrepresentation, a unilateral mistake will not generally constitute a basis for setting aside an agreement unless the mistake is a serious mistake in relation to a fundamental term of the agreement and the other party knew of, or contributed to, the mistake.

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“... it must be shown that one party to the transaction was at a special disadvantage in dealing with the other party ...

What must be present is some disabling condition or circumstance which seriously affects the ability of the innocent party to make a judgment in their own interests ...”

(5) With respect to other doctrines which may be applicable, such as unconscionable dealing, it must be shown that one party to the transaction was at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances that affect their ability to conserve their own interests, and the other party takes unconscientious advantage of the opportunity. It must be emphasised that the disadvantage must be “special” to disavow any suggestion that the principle applies whenever there is some inequality of bargaining power between the parties. What must be present is some disabling condition or circumstance which seriously affects the ability of the innocent party to make a judgment in their own interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.

(6) There may be other factors which arise such as non est factum which defence would arise in very limited circumstances to persons who, through circumstances such as blindness or illiteracy, are unable to have any understanding of the meaning of the document evidencing the agreement and who signed it in the belief it was radically different to what was in fact signed.”

In the present case, the Appeal Panel held that (at [47]), per the principles outlined in *McDonald v McDonald*, there were no relevant grounds to set aside the consent orders made by the Tribunal below:

“[T]he evidence does not disclose that illegitimate pressure was placed on the homeowners such that there was no reasonable alternative but to submit to the settlement, the evidence does not disclose that the homeowners were deprived of free and voluntary consent and that the settlement was the result of the actual influence of the Senior Member, nor does the evidence establish that the homeowners were at a special disadvantage given the presence of two advocates capable of advising them.

2017 COAT National and NSW Conference: In photos



Committee NSW Chapter of COAT

Convenor	Malcolm Schyvens Deputy President NCAT
Vice Convenor	Anina Johnson Deputy President Mental Health Review Tribunal
Secretary	Rodney Parsons Registrar Workers Compensation Commission
Treasurer	Katrina Harry PSM National Registrar, Veterans' Review Board
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People & Events

Save the date

Please mark your diary for the 2018 COAT NSW Conference,
to be held on Friday 7 September 2018.

2017 Whitmore Lecture: In photos

