LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

RESPONSES TO THE COMMITTEE'S QUESTIONS SENT 20 DECEMBER 2011

Q1. One of the issues that the Committee has to grapple with is the definition of 'tribunal' and the scope of its terms of reference.

In your view, how far should consolidation of tribunals extend?

Are there tribunals that should be excluded from consideration?

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Definition of Tribunals

1. I discussed the meaning to be given to the term 'tribunal' in an FOI case some years ago. I will not set out the full text here. See *N (No. 2) -v- Director General, Attorney General's Department* [2002] NSWADT 33.

2. The public register of the tribunals that have joined the Council of Australasian Tribunals gives an insight into what bodies regard themselves as tribunals or having an interest in the work of tribunals (see www.coat.gov.au).

3. The following major NSW tribunals are members: the CTTT, the Guardianship Tribunal, the Mental Health Review Tribunal, the ADT, the Motor Accidents Assessment Service and the Workers Compensation Commission. The following professional discipline tribunals or professional registration bodies with disciplinary powers are members: the Medical Board, the Chiropractors Tribunal, the Dental Tribunal, the Nurses and Midwives Tribunal, the Optometrists Tribunal, the Osteopaths Tribunal, the Pharmacy Tribunal, the Physiotherapists Tribunal, the Psychologists Tribunal and the Architects Registration Board. The membership list also shows GREAT (now absorbed into the IRC). One major tribunal is not a member: the Medical Tribunal (though the Board is). Some health professions are not represented in the membership list, but presently have tribunals or will have, i.e. podiatrists; and the incoming areas of Aboriginal and Torres Strait Islander health practice, Chinese medicine, medical radiation practice; and occupational therapy.

4. An early and, I think, good attempt to set out the primary characteristics of a 'tribunal' is given by Dr J A Farmer in *Tribunals and Government* (Wiedenfeld and Nicolson, London, 1974) at 185-186. I will not set out the full text. The following are the key points:

(1) A tribunal makes decisions or determinations that are final and legally enforceable.

(2) Independence from executive government. Farmer's statement on this subject is comprehensive, and worth setting out in full: 'It is independent of any minister of the crown or department or other agency. Crucially, this independence pertains to the tribunal's

decision-making processes, which it is thought must be free (and be seen to be free) from governmental direction or influence. Independence is also affected by such matters as appointment of tribunal personnel, their security of tenure, provision of staff (e.g. tribunal clerk) and location of hearing rooms.'

(3) A tribunal holds public hearings with judicial features such as the right to appear, to submit evidence, to cross-examine and to make submissions. It usually has simple processes for filing an application and obtaining a reply, and seeks to avoid interlocutory steps. The rules of evidence are usually not applicable. The tribunal is often free to receive whatever material or information it wishes, subject to relevance.

(4) A tribunal gives reasons for its decisions.

(5) A tribunal's membership will often include specialist expertise, though the chair will normally be a lawyer.

(6) There will be a right of appeal, at least on a question of law to a superior court.

5. To the above list, I would add the following as usual characteristics today:

(7) A tribunal does not ordinarily make awards of costs against losing parties.

(8) Tribunals are expected to give strong emphasis to the use of alternative dispute resolution techniques (such as conciliation, mediation and managed settlement discussions).

6. Sir Andrew Leggatt in his report to the UK Government in 2001 also dealt well with this issue in Chapter 1 of his report. He saw tribunals as having the following essential characteristics:

- That they be statutory bodies.
- That they provide specialised machinery for the adjudication of cases that would otherwise be decided by the civil court.
- That they not be regulatory or investigatory bodies; and
- That they generally be concerned with the resolution of disputes between the citizen (whether an individual or a corporation) and the state or disputes between individual parties.

7. Sir Andrew suggested that in determining whether to allocate the determination of disputes to a court or to a tribunal the following factors be considered:

- The desirability or otherwise of enabling direct participation by citizens in preparing and presenting their cases, with appropriate administrative and educational support.
- The desirability or otherwise of having decisions made by a panel of people with a range of qualifications and expertise.
- The importance or otherwise of accessibility for users.
- The expertise in administrative law available in Tribunals and the flexibility and lower costs inherent in merits review.
- The desirability or otherwise of a distinctive approach to the management, preparation and hearing of cases to enable users to act on their own.

8. In Chapter 2, Sir Andrew Leggatt, as Farmer had done in 1974, stressed the importance of Tribunals being seen to be independent in terms of structure, appointment of members, location and administrative support. It referred to the need for institutional separation from client departments, and recommended that they be the responsibility of the Lord Chancellor (i.e. the UK equivalent of the Attorney General in the Australian system). Interestingly, it was proposed that in administrative review, client departments fund the Tribunal's operation in accordance with their use: thereby providing a financial imperative for improving internal, departmental decision making.

9. In Chapter 3, he concluded that 'the current, dispersed arrangements for the administration of tribunals would effectively preclude the reforms which we recommend to the services provided to users. It therefore makes recommendations for a single Tribunals System. The System should include tribunals administered by local authorities, as well as tribunals which deal with disputes between individual parties'.

Australian and NSW Context

10. Tribunals operate in Australia on the non-criminal side of the law. The criminal law is the exclusive province of the ordinary courts. The same perspective is found in the UK as reflected in Sir Andrew Leggatt's report.

11. Parliaments have given jurisdiction to tribunals in relation to matters which could have been left within the civil jurisdiction of the court system, primarily, I think, because of concern over the cost, expense, formality and technicality of the court system. Statutes creating tribunals typically implore them to be just, quick, efficient and cheap without regard to technicalities and legal forms. They may determine their own procedures and typically are not bound by the rules of evidence. Parliaments have also, I think, seen value in having specialist expertise included in the benches that decide cases. This can not be achieved directly in the court model.

12. Courts are comprised only of judges with security of tenure. They apply the rules of evidence. They make final orders that are enforced by a court officer, the sheriff. In civil disputes, the loser pays the winner's costs as assessed.

13. In the world of tribunals the labels 'civil' and 'administrative' are often used today to differentiate the nature of their business. This is seen in the business titles of three of the interstate tribunals (Victoria, Queensland and the ACT).

14. 'Civil' refers to disputes between two private parties, arising for example out of a contract or a duty of care or some other tort relationship claim. The major civil disputes jurisdictions affecting consumers have been consolidated in the Consumer, Trader and Tenancy Tribunal. The creation of the ADT saw some administrative disputes jurisdictions consolidated there. But many remain outside the ADT structure, notably planning and environment (Land and Environment Court) and many professional discipline jurisdictions. The ADT has also had placed with it civil jurisdictions seen as usually having special complexity or special social importance such as anti-discrimination and commercial retail tenancy claims.

15. Care must be taken not to judge the question by reference to the business name of the body. Bodies not called 'tribunal' may fit the criteria, similarly bodies called 'tribunal' may not.

16. In NSW the Dust Diseases Tribunal is declared by its statute to be a court of record. In my view, that declaration does not answer the question of whether it is a court or tribunal (to similar effect, see Farmer at p 183 discussing the UK Transport Tribunal of that era). It does for example exhibit some of the features of a tribunal, especially in relation to the special and flexible procedures that it has developed. However its bench is confined to judges, and it applies, as I understand it, the rules of evidence and makes costs awards in the usual way.

17. At the other end of the spectrum there is the 'Independent Pricing and Regulatory Tribunal' (IPART). That body is essentially a pricing decision-maker in respect of major utility services, taxes, charges and the like affecting the population of the state where the provider is a monopoly. This is a systemic function far removed from the ordinary work of tribunals. It is a 'policy-oriented' tribunal in the way that expression is used by Farmer. I am inclined to think it is not, at least in respect of its primary functions, a tribunal of the kind to which the terms of reference of this Inquiry is addressed.

18. Then there are bodies which exercise tribunal-like functions but fall under the general administration of a state department or authority. The claims assessment resolution service (CARS) within the Motor Accidents Authority may be an example. The housing appeals committee in the Department of Housing might be another example.

In your view, how far should consolidation of tribunals extend?

19. I think that a wide-ranging approach should be taken to the consolidation of tribunal jurisdictions in NSW. This offers the greatest chance of achieving the best outcomes in relation to user friendly service, equities in the distribution of resources and increased professionalism.

20. I favour the comprehensive approaches seen in Victoria and the UK.

21. In my view that approach should embrace: external merits review of administrative decisions, all professional discipline (legal profession, medical, nurses, the other human health professions, veterinary practitioners and the other jurisdictions presently housed in the ADT), guardianship and consumer claims including home building disputes and residential tenancy claims. Similarly, the proposed NCAT should include relatively small-volume tribunals such as the Local Land Boards, the Vocational Training Tribunal and the Local Government and Pecuniary Interest and Discipline Tribunal.

22. In principle, the statutory insurance disputes tribunals such as the Workers Compensation Commission and the Motor Accidents Assessment Service should be included. These tribunals deal with often complex personal injury claims. Decisions require specialist medical expertise. Often there is an emphasis on alternative dispute resolution in the form of arbitration, as is seen at the WCC. These are not features of so unique a kind that they could not be adequately handled in an integrated tribunal framework. For example, Commonwealth employees' compensation disputes are heard by the Commonwealth AAT, the Commonwealth's super tribunal. The State statutory insurance disputes jurisdictions might readily form a specialised Compensation Division of the proposed NCAT.

23. Similarly there is no in-principle difficulty, as I see it, with including the Mental Health Review Tribunal. It is noteworthy that the UK structure includes mental health. I appreciate that mental health review has tended to be left outside the super tribunal structures in Australia, but I do not see any fundamental reasons of policy as to why that need be so. Obviously, great care needs to be taken in relation to the management of the forensic patients jurisdiction. Mental health could be placed with guardianship matters in a Protective Division of the proposed NCAT.

24. I see the use of specialised divisions and lists within those divisions as critical to the operation and success of the proposed NCAT.

25. Mr Shoebridge referred to what he saw as a different approach to the issue of the use of divisions and lists in the case of the WA State Administrative Tribunal (WA SAT) and ACT Civil and Administrative Tribunal (ACAT). He referred to comments that the Committee had received from those bodies. I have been

unable to locate on the Committee's website any material from those bodies. In my discussions in the past with their heads (Justice Chaney, WA, and Ms Crebbin, ACT) and reading their annual reports, my understanding is that they do use division and list structures to ensure appropriate differentiation.

26. Sir Andrew Leggatt in his report of 2001 to the UK Government listed the following benefits as flowing from the consolidation of tribunals into a multi-jurisdictional or 'super' tribunal. As I have set out in my principal submission I agree with his views. He referred to:

- promotion of a renewed sense amongst tribunals and their staff that they are there to do different things from the courts, and in different ways, but with equal independence.
- better enabling tribunals to operate as a distinctive and viable alternative to courts.
- ease the sense of isolation of tribunals.
- enable more equitable sharing of tribunal resources and the adoption of best practice procedures and administrative processes.
- provide a career path for staff.
- enable the separation of tribunals from their client departments thereby enhancing independence.

27. In addition, I would add that Tribunals are expected to be responsive to the market or user community that they serve in a way that is usually not expected of the courts. So in any consolidated tribunal structure careful attention needs to be given to consultative liaison and user group arrangements. Similarly careful attention needs to be given to regional arrangements and relationships.

Are there tribunals that should be excluded from consideration?

28. I do not think so, subject to the comments I have made about the definitional issues.

Q2. Your submission (p 4) states that a foreseeable difficulty of consolidating tribunals is the loss of 'brand identity' or 'name recognition' of those tribunals that are merged into one. Do you have any suggestions as to how that might be overcome?

29. Inevitably there will be some loss of brand identity and name recognition.

30. The key to ensuring that people know that the new tribunal, NCAT, is the place to which you now go instead of, for example, to one of the predecessor tribunals, is the Information Strategy of the integrated tribunal. The benefits of integration outweigh, as I see it, the loss of brand identity.

31. The CTTT's web presentation is very good, and provides a local example of a strong approach on this issue. The same can be seen in the web presentations of VCAT, the WA SAT and the ACAT. But more is required than that.

32. Critical, as I see it, is the quality and experience of the staff who deal by phone, email or at the counter with the provision of information. There needs to be a strong emphasis on staff training. It will be necessary, as I see it, to have some sub-registry arrangements, for example in areas such as large amount residential home building disputes and professional discipline.

33. If these steps are taken, the public of NSW would soon become used to the idea that you either take your legal problem to the courts or to the super tribunal. So I think they would soon come to understand that the relevant separate tribunal of the past is now likely to be part of the super tribunal. This is how it has worked out in the interstate super tribunals.

Q3. The Committee's terms of reference ask us to consider the current and forecast workload of tribunals in NSW. Can you describe your current workload and how you anticipate it might change in the future?

34. The ADT is a low volume tribunal compared to, for example, the MHRT, the Guardianship Tribunal and the CTTT. We have had now for some years a consistent file intake of about 1,000 matters per annum. I have attached a graph showing our trend line since we were founded.

35. I would expect that trend line to remain steady, if there are no significant variations to our jurisdiction. Our annual reports set out the details of our workload.

Q4. Several submissions have emphasised the importance of a tribunal system providing adequate support to self-represented litigants. Do you agree? How do you think a super-tribunal could properly achieve this?

36. I agree that the 'tribunal system' should provide appropriate support to self-represented litigants.

37. But a distinction needs to be drawn between what it is appropriate for the tribunal itself to do (including its registry), and what is appropriate to be done within the framework of support provided by government more generally.

38. Tribunal members are obliged to conduct their hearings in a way that minimises any disadvantage that may be experienced by a litigant in person who is faced by a lawyer representing the other party. But they must do this in a manner which does not involve them being seen as an advocate for the litigant in person.

39. The ten year review of VCAT undertaken by Justice Bell considered this issue of imbalance in some detail. The ultimate recommendation was that government community legal centre funding be provided to a 'self represented persons legal service'. If such a service existed, it would be able to support litigants in person in addressing the legal and technical difficulties they face in pursuing a case. The service could give background advice going beyond the limits that must constrain tribunal members or tribunal registry staff. At present community legal centre arrangements in NSW are either district-focussed or subject-matter focussed (e.g. tenancy, mental health, consumer credit). The Bell recommendation seeks to cut across this and place the emphasis on the basic fact that the person is proceeding without legal professional assistance.

40. In addition I see value in a level of personal support being provided to self-represented litigants. Some of them are deeply troubled, and in our judgment have psychological or mental health conditions. I see value in the Tribunal having some capacity to draw on a service that offers support of this kind.

41. The ADT's legislation allows for the appointment of a guardian ad litem. The power is exercised where a person is a child or lacks the capacity to present their case. Appointments have mainly been made on behalf of protected persons applying for review of financial management or care decisions taken by the NSW Trustee and Guardian. They have sometimes been made for review applicants in FOI cases and for applicants in anti-discrimination cases. We have been greatly assisted in obtaining appropriate guardians ad litem by the Guardian ad Litem Service managed by the Department of Attorney General and Justice. We see this Service as having an important role to play in the effective operation of a super tribunal. Any new scheme should preserve this facility.

Q5. In its submissions (p 8) the Tenants Union of NSW has recommended that all public housing decisions should fall within the jurisdiction of the ADT. What are your views on this suggestion?

42. As I understand the Tenants Union submission, it supports the general consolidation of tribunals in NSW. Also, it regards as acceptable the present arrangement of having public housing tenancy disputes of the usual kind being dealt with in the same tribunal list as private tenancy disputes.

43. However the Tenants Union is critical of the fact that some administrative decisions taken by the Housing Department under statutory powers are immune from external review. It gives as the prime example the exercise of the discretion to remove the rebate component of the market rent. The example given referred to an unreported situation of co-habitation by a person in receipt of income. The Department may move to recover the rebate extending back several years, and a very high sum may be involved. As I understand the submission, the housing

appeals committee's recommendation on matters of this kind is sometimes ignored by the Department. These decisions should, in principle, be subject to external merits review, as argued by Mr Freer and Ms Foreman in their submissions. I see no difficulty in NCAT having such a review jurisdiction.

Additional Matters

(1) Statistics relating to Proportion of Equal Opportunity claims that refer to Workers Compensation claims

44. A question that was asked at the Parliamentary inquiry was how many of our Equal Opportunity Division cases also involved workers compensation claims. Of the 92 Equal Opportunity Division complaints that were open on 31 October 2011, 9 (10%) were complaints where the complainant had also made a workers compensation claim. As the law currently stands, workers compensation entitlements and remedies under the Anti-Discrimination Act are completely separate.

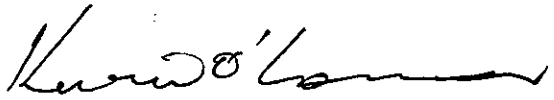
(2) Harmonisation and Standardisation of Procedures

45. This was a theme of many of the questions put to witnesses by the Committee.

46. As my submissions have emphasised, I think it is vital to the success of an integrated, multi-jurisdictional tribunal that appropriate differences in procedures and business approaches be maintained.

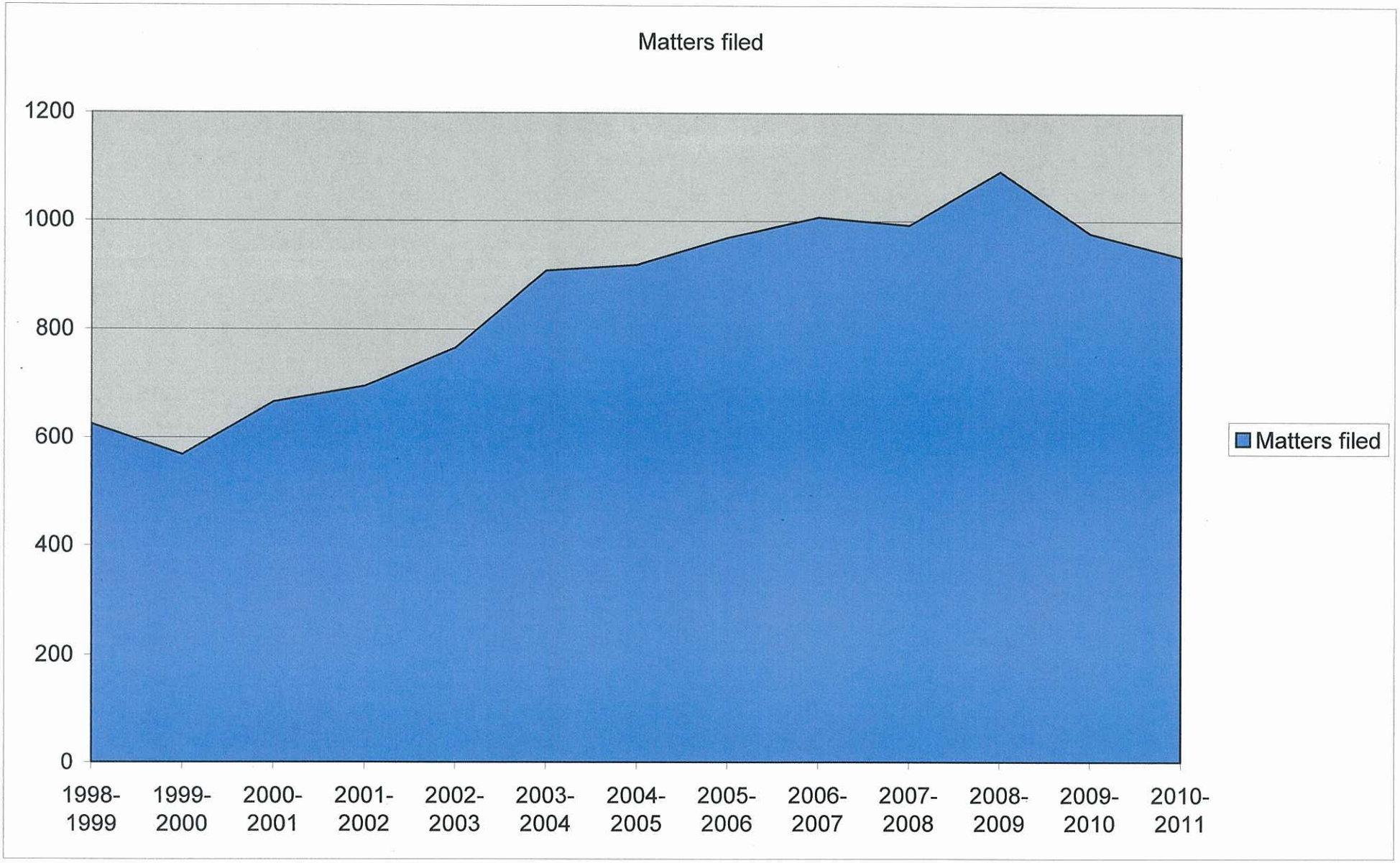
47. There will be areas where a high degree of common practice and identity can be reached, for example in website presentation, document presentation and in the primary data collection fields and primary case management data. But after that there will necessarily be a good deal of variation in the more specific information that is required at the intake stage and in how particular classes of case are conducted thereafter. These are familiar management challenges in the super tribunals already in existence.

48. The ADT has different business practices in its various streams. For example, we handle professional discipline cases quite differently from merits review cases or civil claims.



Judge Kevin O'Connor, AM
President, Administrative Decisions Tribunal of NSW

19 January 2012


Matters filed
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