

Government Lawyer

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- Chair's Message
- 2008 Government Solicitors Conference and Dinner
- 2008 Excellence Award in Government Legal Service
- Copyright and Government Agencies
- Committee 2008
- Justice Margaret Beazley AO's address to the Toongabbie Legal Centre Dinner
- A Government Lawyers Guide to Rules on Ethical Issues
- NSW Legislation Update

Chair's Message

By Mary Macken

Chair, Government Solicitors Committee



As we near the end of another year, the **13th Annual Government Solicitors CLE Conference and Dinner** were again a highlight. The Conference returned to the Theatre of Parliament House this year to ensure all delegates were comfortably accommodated.

The Chief Executive Officer of the NSW Legal Aid Commission, Alan Kirkland, opened the Conference and delivered the Keynote address choosing to focus on the diverse roles and contributions of government lawyers and their responsibilities in the context of the functions of Government.

Planning was a new inclusion to the selection of topics covered at the Conference in 2008 and was favourably received by Conference attendees. I must extend my sincerest thanks to all the Committee members who assisted with the planning and coordination of this year's Conference.

Aside from the Conference the Committee has been busy finalising and launching **A Government Lawyers Guide to Rules on Ethical Issues**. The Guide is a simple, easy to read manual that advises lawyers from Federal, State or Local levels of Government what Rules, Acts, Regulations and Guidelines are applicable to their situation. Many thanks to Jenny Stathis for her hard work and diligence on this project. More information on the Guide can be found later in this publication.

*On behalf of the Government Solicitors Committee,
I wish you all the best for 2009.*

2008 Government Solicitors Conference and Dinner

The 2008 Government Solicitors Conference was attended by nearly 150 delegates from a wide variety of government agencies and Departments across the public sector. The Conference was opened by Mr Alan Kirkland, CEO, Legal Aid Commission of NSW.

Other sessions throughout the day included:

- Sandra Duggan, Martin Place Chambers spoke on the recent amendments to the NSW planning regime and focused on the substantial changes to the *Environmental Planning and Assessment Act 1979*.
- Peter McEwen SC, Martin Place Chambers discussed the implications of the acquisition of land and planning and identified a number of the possible impacts occurring when land is compulsorily resumed.
- Professor Les McCrimmon, full-time Commissioner, Australian Law Reform Commission presented an overview of *For Your Information: Australian Privacy Law and Practice* and discussed the recommendations arising from the report.
- Professor Michael Tilbury, full-time Commissioner, NSW Law Reform Commission discussed the NSW LRC's review of privacy law and the relationship between it and the ALRC report.
- Peter Callaghan SC, Chairman, NSW Chapter, Institute of Arbitrators and Mediators Australia discussed the lawyers role in Alternative Dispute Resolution and commented on a number of recent developments in mediation, expert determination, arbitration and dispute resolution boards.
- Georgina Beattie, Director, NSW Better Regulation Office, provided an informative review of the *Guide to Better Regulation* and outlined the seven better regulation principles and how to apply the principles.
- Sandra Henderson-Kelly, Senior Legal Officer, Australian Attorney-General's Department presented an overview and update of Personal Property Securities Law and the subsequent implications.
- Paul Monaghan, Senior Ethics Solicitor at the Law Society chaired the final session of the day on Legal Professional Privilege. The panel

session between Ian Knight, NSW Crown Solicitor and Chris Wheeler, Deputy NSW Ombudsman was entertaining as well as informative providing delegates with some interesting views on legal professional privilege and its application to public sector lawyers.

Excellence Award in Government Legal Service 2008

The Excellence in Government Legal Service was awarded to Mr John Murn from the Department of Education and Training. Mr Murn was responsible for ensuring the legal services directorate operates effectively and humanely in the face of a rapidly expanding work load, including increased prosecutions, commercial work and legislation as well as range of significant external reviews and stringent budget constraints. Mr Murn had also taken on the role of managing the Department's involvement in the LEAPS mentoring program and is highly respected by all staff within the legal services directorate both senior and junior.

An excerpt from Mr Murn's nomination:

John must be regarded as one of the Education Department's rare 'national living (and working) treasures'. He combines a long legal experience (over 20 years with the Department and breadth of knowledge; a warm and friendly personality; a strong sense of diligence, conscientiousness and commitment to the task; a fine model of ethical behaviour and willingness to provide forthright advice; a sense of wit and good humour; a calm, patient, unruffled persistence; and a calm ability to cope in the face of unexpected 'crises'.

There were five nominations for the Excellence Award this year and competition was fierce. Thank you to the sub-Committee for their deliberations.

Thomson Reuters once again sponsored the Award and donated the \$1500 prize money.

Copyright and Government Agencies

Background to the payment of copyright fees

The *Copyright Act 1968* (the Act) sets out the exclusive rights copyright owners have in relation to their works. To do any of the acts below without the permission of the copyright owner generally constitutes infringement of copyright e.g.:

In the case of a literary, dramatic or musical work, to do all or any of the following acts:

- to reproduce the work in a material form
- to publish the work
- to perform the work in public
- to communicate the work to the public
- to make an adaptation of the work

In the case of an artistic work, to do all or any of the following acts:

- to reproduce the work in a material form
- to publish the work
- to communicate the work to the public

Exceptions to infringement and the government statutory licence under s183

Fair dealing

However, the Act also includes exceptions to infringement in certain circumstances and for certain purposes. This includes the 'fair dealing' provisions of the Act, The Act sets out the only circumstances in which fair dealing can apply. The 'fair dealing' provisions of the Act allow limited use of copyright material without the permission of the copyright owner. It is irrelevant as to whether the user considers the use to be fair or not. The only purposes for which uses may be considered a fair dealing include:

- Research or study (s40 and s103C)
- Criticism or review (s41 and s103A)
- Parody and satire (s41A and s103AA)
- Reporting the news (s 42 and s103B)
- Legal advice (s43)

Government statutory licence

The Act also grants all Commonwealth, State and Territory governments a statutory licence to use copyright material without the permission of the copyright owner for the 'Services of the Commonwealth or State' (s183). However all governments are required to pay equitable remuneration under s183 to copyright owners for the use.

The Act recognises that it may be impractical for governments to seek out every copyright owner for every occasion of copying. The Act (at s183A) sets out a regime where governments can deal with copyright collecting societies (who represent copyright owners) rather than agreeing to terms with each and every copyright owner whose works are copied by government. For the purpose of government copying, agreement is required to be made with the following:

- Screenrights – for copying of television and radio broadcasts
- Copyright Agency Limited (CAL) – for copying of published works

If agreement can't be reached with these collecting societies, the Copyright Tribunal may be asked to determine rates for equitable remuneration.

Copyright fees

The government's obligations to Screenrights are yet to be determined (as the government is yet to complete an interim survey of television and radio).

The last agreement with CAL ceased in June 2006. The new agreement for CAL is for the period from 2006-2011.

CAL copyright fees are calculated following the results of surveys of government copying activities.

The most recent copyright fees paid by NSW State Government to CAL for 2005-2006 were almost \$3 million.

Reducing copyright fees

Copying undertaken under the 'fair dealing' provisions, while more limited in scope and circumstance, do not attract a requirement for payment to copyright owners. Therefore, copying under the 'fair dealing' provisions may help reduce copyright costs for public sector agencies. Unlike 'fair dealing', copying undertaken under the statutory licence (s183) is unlimited provided it is for 'the Services of the Commonwealth or State'.

Copying under the fair dealing provisions can take place independently of agreements with collecting societies or copyright owners and can take place regardless of the contents of those agreements. However, you must ensure that the activity fits within the requirements of the fair dealing provisions.

Copyright and Government Agencies

Reducing the copyright fees for others using your agency's works

Just as the government is required to pay for copying of the work of others, other copyright users are required to pay for the copying done of government works. Therefore, it is important that agency's display clear copyright policies on the works they produce to ensure that the appropriate protections are in place.

If you want to ensure the wide distribution of government information, then a permissive copyright notice is required to appear on the work. For example, if you want your agency publications to be copied and viewed to a wide audience:

- ALWAYS include an accurate copyright notice. Works that are silent on copyright or contain only the © attract a restricted level of protection, making it illegal for others to copy your work (except as provided in the Act)
- ALWAYS include a statement in your copyright notice that copying is "free for education" to ensure that schools and TAFEs in NSW and around the country are not charged for using your work.

A copyright policy tells the public the extent to which they may use works protected by copyright without first seeking permission from your agency. If your agency publications are locked in the ways

illustrated above, other users will be forced to pay copyright fees for your work should the copying be captured during one of CAL's surveys.

This could mean that other state and territory government departments, as well as schools, TAFEs and Universities across the country could be charged for copying your work when that may never have been the intention of your agency. For example, schools and TAFEs alone pay around \$55 million per year to CAL.

Given that most of the information government's produce is designed to be widely distributed, this generates an unnecessary cycle of public money where the main beneficiary is CAL, who carve off around 18% for administration before the money is distributed to its author/publisher members (which includes government).

Further Information

Further information on copyright for NSW government agencies is available on the Attorney General's Department of NSW website at: www.lawlink.nsw.gov.au/lpd (then select 'Copyright Unit').

This includes a useful Copyright Management Toolkit, which provides a step by step guide to assist agencies to implement a copyright policy and manage their copyright assets effectively.

This document has been prepared by the Attorney General's Department of NSW for general information purposes and while every care has been taken in relation to its accuracy, no warranty is given or implied. Independent advice should be taken before making any decisions that rely on this information.

2008 Government Solicitors Committee

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Justice Margaret Beazley AO – Address to the Toongabbie Legal Centre Dinner

Providing the Underbelly

“One thing that thirty years in the law has given me personally is a very real belief in the importance of the institution of law and the role it plays in a stable society” Justice Margaret Beazley said in her address as chief guest at a dinner on 28th June to raise funds for the recently-established Toongabbie Legal Centre (TLC). She then added that “the system is useless unless it can be assessed by those who need its protection.”

Justice Beazley, who is currently the most senior woman on the bench in the state serving on the Court of Appeal in the NSW Supreme Court, reminded the lawyers who were among more than 160 guests at the dinner in support of Toongabbie Legal Centre that it is they who have the knowledge and obligation to assist people in the legal system. While it may be a familiar place for those in the legal profession, she stressed that it can be a foreign and sometimes treacherous territory for those outside the profession.

It was in order to assist the neediest through this “foreign and treacherous territory” that a small group of solicitors, immigration agents, social workers, law students, financial planners and other community members have worked from November 2005 to establish the Centre. The dinner which was held in a simple church hall in Toongabbie was the inaugural fundraising event for the Centre which was formally established in March 2007. Toongabbie Legal Centre at present depends completely on volunteers and serves those in greatest need in the area. It conducted its first session in October 2007 and serves clients on a drop-in basis on Saturday mornings between 10.00am and 1.00pm. The Centre enjoys the hospitality of the local parish of St Anthony’s and hopes to be able to increase its opening times to include Thursday evenings in the near future. Since opening, approximately 200 clients have sought assistance on a range of matters.

Toongabbie Legal Centre plans an official launch in the coming months. The Honorary Coordinator of the Centre is Mr Susai Benjamin who has long been involved in the local area providing informal advocacy and support for those in need. Principal

Solicitor of the Centre, Mr Michael Vassili emphasised TLC’s commitment to community education by being “proactive in making members of society aware of their legal rights”. The dinner was organised by a small team of volunteers, who are members or friends of TLC.

Justice Beazley congratulated the founders and volunteers of the Toongabbie Legal Centre for the impact which the Centre has made in its very short existence and encouraged those at the dinner to support its work. “It is a tough world out there” she said, “and it is, particularly in an era of economic rationalism, unless we as a community provide the underbelly.”

Toongabbie Legal Centre is a community initiative striving through the work of generous volunteers to provide such an underbelly. Anyone who is interested to support the Toongabbie Legal Centre should contact: Mr Susai Benjamin, Honorary Coordinator, coordinator@tlc.asn.au or send a short note to TLC, P.O.Box 232, Toongabbie NSW, 2146.

A Government Lawyers Guide to Rules on Ethical Issues

The Society’s Government Solicitors Committee has produced this Guide to assist lawyers working in a federal, state or local government department or agency in New South Wales.

The Guide sets out the Acts, rules, regulations and guidelines relating to ethical issues, the purpose of the rules, where copies can be found, who administers them as well as a list of cases that deal with specific ethical issues that may arise from day-to-day practice.

To obtain your copy of this Guide please go to:

http://www.lawsociety.com.au/uploads/lelibrary/1226361486926_0.6190491668661628.pdf

NSW Legislation Update

Administrative Decisions Tribunal

The NSW Parliament passed the Administrative Decisions Tribunal Amendment Bill 2008 on 22 October 2008 and the Act will commence on Proclamation.

The Act:

- increases the amount of compensation that can be awarded by the Tribunal in its Equal Opportunity Division from \$40,000 to \$100,000.
- clarifies, in section 8 of the Act, that the Tribunal can review the conduct of an administrator. This amendment puts beyond doubt that the Tribunal's review jurisdiction includes the review of the conduct of administrators. An example of such reviewable conduct can be found in the *Privacy and Personal Information Protection Act 2002*.
- requires agents who are not legal practitioners to obtain leave from the Tribunal to represent a party. This amendment seeks to redress concerns that some classes of agent who are appearing in the Tribunal are not necessarily able to act in the professionally detached manner that is required in order to represent another's interests effectively.
- The Bill also amends section 88 to confirm that the parties in the Tribunal are to bear their own costs unless the Tribunal otherwise orders, and incorporates an expanded range of matters to be considered in the making of an award of costs.

Before a reviewable decision may be considered by the Tribunal, administrators are usually obliged to provide a statement of reasons for the decision and to conduct an internal review of the initial decision. In order to provide greater clarity concerning the decision making timeframes, the Act makes a number of amendments:

- Section 53 is amended to require an administrator to notify a person of the result of an internal review within 21 days after the application for internal review is lodged, or such other period as is agreed.
- Section 55 is reworked so that the period within which an application for a review in the

Tribunal is to be made - having regard to whether or not reasons have been requested and provided or not, and whether or not an internal review has been conducted - is clear.

- Section 58 is also amended to make it clear that a copy of any statement of reasons provided on internal review must be provided to the Tribunal.

The Act makes other procedural amendments to the ADT Act including:

- Sections 44 and 57 are amended so that the Tribunal may dispense with the need for a late application to be in writing. This will avoid the need for the Tribunal to insist on applications in writing when they are made during the hearing of a matter.
- Section 67(4) is amended to give the Tribunal a broader power to join a person as a party to the proceedings if necessary.
- The circumstances where proceedings can be dismissed are expanded to include dismissal for want of prosecution or where an applicant fails to appear. A concomitant right to reinstate proceedings where the applicant who failed to appear provides a reasonable excuse is included.
- The Tribunal at first instance will - like the Appeal Panel - be able to refer questions of law to the Supreme Court, and these referrals will always - regardless of the status of the presiding Tribunal member - be assigned to the Court of Appeal.
- The Act clarifies that the 28 days within which an appeal from a first instance decision of the Tribunal is to be lodged, may run from the provision of either oral or written reasons - whichever is the later.

Vexatious Proceedings

The NSW Parliament also passed the Vexatious Proceedings Bill 2008 in October and the Act will commence on Proclamation. The Bill is designed to expand the powers of the courts to control vexatious litigants.

Both the New South Wales Supreme Court and the Land and Environment Court currently have

NSW Legislation Update

the power to make orders relating to a vexatious litigant. The relevant provisions provide that the Attorney General or an aggrieved person may seek orders to restrain a vexatious litigant from continuing any proceedings or from bringing fresh proceedings in any New South Wales court except by leave.

The Supreme Court may also make orders relating to a vexatious litigant who has instituted proceedings in any inferior court. However, these provisions are limited in operation.

The Bill will:

- provide comprehensive definitions of “proceedings” and “vexatious proceedings.”
- enable the Land and Environment Court and the Industrial Relations Commission in Court Session to make orders in relation to vexatious litigants, but limited to proceedings in their respective jurisdictions.
- enable the Supreme Court to make orders in relation to person who has commenced proceedings in any NSW court or tribunal.
- expand the range of people who may apply for a vexatious proceedings order to include the Solicitor General and the registrar of the relevant court.
- also allow any person with a sufficient interest in the matter, and who has obtained the leave of the court, to apply for a vexatious proceedings order.
- provide for the establishment of a register of vexatious proceedings orders and related orders. The register will be maintained by the Supreme Court on behalf of all courts that make vexatious proceedings orders. The register will be accessible by the legal profession and members of the public and published on the court's website.

Current New South Wales legislation provides that a court may only make an order to restrain a vexatious litigant where a person “habitually and persistently and without any reasonable grounds” institutes vexatious legal proceedings. The proposed new legislation provides that the court may make a vexatious proceedings order if it is satisfied that a person has “frequently” instituted or conducted vexatious proceedings in Australia.

The new test has been deliberately chosen to make it easier to obtain a vexatious proceedings order against a vexatious litigant. In applying this simplified test, the court may have regard to proceedings instituted in, or orders made by, any Australian court or tribunal.

In addition, the Bill will allow the court to make an order when a person is acting in concert with a person who is the subject of a vexatious proceedings order or has frequently instituted or conducted vexatious proceedings.

That could include, but is not limited to, a relative or associate who may institute proceedings on behalf of the vexatious litigant. To ensure that the person's rights are protected, the person must be given the opportunity to be heard in relation to the matter.

The Bill provides that when a vexatious proceedings order is made the court can order a stay of all, or part, of any proceedings already instituted by the person, or prohibit the person from instituting proceedings. The court can also make any other orders that it thinks fit—for example, an order directing that the person may only file documents by mail or give security for costs.

A vexatious proceedings order may be varied or set aside by order of the court of its own motion or following an application. An authorised court may also reinstate a vexatious proceedings order prohibiting a person from instituting proceedings if the court is satisfied that, within five years of the order having been set aside, the person has instituted or conducted vexatious proceedings in an Australian court or tribunal, or acted in concert with another person who has done so.

A person who is the subject of a vexatious proceedings order or a person acting in concert with such a person may apply to the appropriate authorised court for leave to institute proceedings that are the subject of an order. The court may dispose of such an application by either dismissing the application or granting it. There will be no appeal from a decision disposing of an application.

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