Civil and Administrative Tribunal

New South Wales

Case Name:	Mielczarek v Commissioner of Police, NSW Police Force (No 2)
Medium Neutral Citation:	[2016] NSWCATAP 255
Hearing Date(s):	21 October 2016
Date of Orders:	29 November 2016
Decision Date:	29 November 2016
Jurisdiction:	Appeal Panel
Before:	Cowdroy ADCJ QC, Prinicpal Member Dr J Renwick SC, Senior Member
Decision:	(1) The appeal is dismissed. (2) By consent and pursuant to s 64(1) of the Civil and Administrative Tribunal Act 2013, publication or broadcast of: (i) those portions of the decision in this matter that address material filed by the second respondent on a confidential basis, or given at the confidential hearings conducted pursuant to section 49 of the Civil and Administrative Tribunal Act on 4 November 2015 and 12 January 2016 are restricted to the second respondent and to the Appeal Panel; and (ii) publication or broadcast of the above portions of the decision to the public, including the appellant and the first respondent, is prohibited.
Catchwords:	CIVIL AND ADMINISTRATIVE TRIBUNAL – Appeal Panel
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Crimes (Criminal Organisations Control) Act 2012 (NSW) Criminal Records Act 1991 (NSW)

	Tattoo Parlours Act 2012 (NSW)
Cases Cited:	Austin v Commissioner of Fair Trading and Commissioner of Police [2016] NSWCA 179 Blissett v Commissioner of Police, New South Wales Police Service [2006] NSWADT 114 Certain Lloyd's Underwriters v Cross [2012] HCA 56 Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 Comalco Aluminium (Bell Bay) Ltd v O'Connor (1995) 131 ALR 657 Constantin v Commissioner of Police, New South Wales Police Force (GD) [2013] NSWADTAP 16 CSR Ltd v Eddy (2005) 226 CLR 1 Day v Sanders (2015) 90 NSWLR 764 Director of Public Prosecutions v Smith [1991] 1 VR 63 Duncan v Independent Commission Against Corruption [2016] NSWCA 143 Health Care Complaints Commission v Do [2014] NSW CA 307 Hill v Green [1999] NSWCA 477 House v The King (1936) 55 CLR 499 Kirbach v Health Care Complaints Commission (No.2) [2015] NSWCA 234 Kocic v Commissioner of Police, NSW Police Force [2014] NSWCA 368 Mielczarek v Commissioner of Police and Ors [2016] NSWCATAD 34 Minister for Aboriginal Affairs v Peko-Wallsend (1996) 162 CLR 24 Naziry v Director-General, Ministry for Transport [2004] NSW ADT 40 Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors [2012] HCA 36 Politis v Commissioner of Taxation (Cth) (1988) 16 ALD 707 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc [2014] NSWCA 105 Zahra v Commissioner of Police [2014] NSWCATAD 211
Category:	Principal judgment

Parties:	Aleksander Gustav Mielczarek (Appellant) Commissioner of Police, NSW Police Force & Commissioner for Fair Trading (Respondents)
Representation:	Counsel: I S Young (Appellant) C Mantziaris (Respondents)
File Number(s):	AP 16/14168
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Administrative and Equal Opportunity Division
Citation:	[2016] NSWCATAD 34
Date of Decision:	22 February 2016
Before:	Prof G Walker, Senior Member
File Number(s):	1510566

REASONS FOR DECISION

Introduction

1 By notice of appeal filed on 18 March 2016, the Appellant appeals the decision of the Tribunal delivered on 22 February 2016: see *Mielczarek v Commissioner of Police and Ors* [2016] NSWCATAD 34 (**the decision**).

2 By such decision, the Tribunal found that the Respondent's decision to refuse to the Appellant a tattooist's licence was the correct and preferable decision and should be affirmed. In reaching its conclusion, the Tribunal found that whilst the Appellant was a fit and proper person to hold the licence, the public interest was not satisfied by the award of a licence to the Appellant. On this ground, the Tribunal made its determination.

3 The hearing which is appealed from occupied four days of hearing time, during which the hearing was closed to enable the Respondent to provide information which, in the Respondent's opinion, related to criminal intelligence and as such was to remain confidential to the Respondent and the Tribunal only.

Facts

4 As appears from the decision, it challenged the decision of a delegate of the Respondent made on 30 June 2015. That decision was reported to the Commissioner for Fair Trading under s 19(1) of the *Tattoo Parlours Act 2012* (**the Act**). The report stated that, following an enquiry into the Appellant's application, it was found that the Appellant was not a fit and proper person to be granted a licence because of the reason that he was a member of the Rebels Outlaw Motorcycle Gang (**the Rebels**), and for that reason it would be contrary to the public interest for the Appellant to be granted a licence under the Act.

5 The Act provides that a tattooist's licence may be granted subject to conditions. Relevantly, s 14 of the Act provides that upon receipt by the Secretary (defined hereunder) of an application for a licence under the Act, investigations and inquiries must be carried out and the Secretary must refer such application to the Commissioner for investigation to determine whether the applicant is a fit and proper person to be granted a licence (s 14(b)(1)) and whether it would be in the public interest for the licence to be issued to the applicant (s 14 (1)(b)). Section 19(2) provides as follows:

> The Commissioner may also investigate and determine, whether at the request of the Secretary or on the Commissioner's own initiative, either or both of the following and report to the Secretary on them:
>
> (a) whether the applicant is a fit and proper person to be granted the licence; and
>
> (b) whether it would be contrary to the public interest for the licence to be granted."

6 Prior to 2015, the Appellant, between 2008 and 2009 established tattoo shops in Picton and in Bowral with his former wife. At approximately the same time, he opened a tattoo shop in Cabramatta with a business partner but that shop was later closed. As at the date of the decision, the shops in Picton in Bowral were still operating but the Appellant and his wife divorced. The wife now wishes to withdraw from the business.

7 The business currently creates employment for approximately 20 people including the Appellant's former wife and himself. Seventeen of the workers are

engaged on contract. There had been no breaches of the Act or Regulations in respect of either shop.

8 The evidence before the Tribunal below found that the Appellant had been involved in the motor car industry, after leaving school but then became involved with the Rebels. The Rebels had come to the attention of the New South Wales Police for unlawful conduct. At least one of its members was murdered and there had been acts of violence including shootings, fire bombings and a drive-by shooting in Picton as a result of which the Appellant's shop and an adjoining shop were sprayed with bullets. The adjoining shop, known as "Such Is Leather", also operated by a member of the Rebels, and the Picton shop operated by the Appellant sustained damage in the drive-by shooting on 8 November 2015. A month later on 8 December 2015, the proprietor of the adjoining business, Wallace, was shot dead. On the following day, his alleged assassin was also found dead, apparently by suicide.

9 The Tribunal found that although the Appellant had joined the Rebels in 1999 at the age of 36 years and he knew that the Rebels members had been involved in serious crimes of violence, the Appellant no longer had a strong association with the Rebels. The Tribunal considered the continuing association was "fragmentary". However, he had been acquainted with the founder of the Rebels. Significantly, the Appellant had no criminal record and held a firearms licence, although in June 2012 police seized his firearms because of the failure to renew the licence. The Tribunal concluded that the Appellant had established that, notwithstanding his membership of the Rebels, he was a fit and proper person to hold a licence under the Act.

10 The Tribunal considered the question of the public interest. It found that it would be contrary to the public interest for the Appellant to be granted a licence. The Senior Member observed, following a decision of Montgomery SM in *Zahra v Commissioner of Police* [2014] NSWCATAD 211, that until such time as the Appellant fully dissociated himself from the Rebels, the risk to the public would remain and therefore the licence should not be granted.

Grounds of Appeal

11 The Appellant raises three grounds which it submits will justify the appeal being upheld. If any one of the grounds is upheld, the appellant then seeks leave for the Appeal Panel to consider the merits of the application before the Tribunal. The Respondent has foreshadowed that in the event that any of the three grounds relied upon are upheld, and the Appeal Panel considers it appropriate, that it should reconsider the merits of the application, then the Respondent will seek leave to reopen the hearing and to produce further evidence challenging the finding of the Appellant's fitness to hold a licence.

12 Each of the grounds of appeal challenge the approach of the Tribunal, as considered more fully hereunder, but the grounds include a submission that the Tribunal below misapplied existing authority; erred in determining how the "public interest" test was to be applied, and wrongly applied an authority to the test of "public interest". Before proceeding to deal with these submissions, it is appropriate to consider first the relevant legislation.

The Act

13 The Act contains no objects. It establishes a scheme for the licensing and regulation of body art tattooing businesses and body art tattooists. It provides that an application for a licence must be made to the "Secretary", which is defined in s 3 of the Act, relevantly as the Commissioner for Fair Trading, Department of Finance, Services and Innovation (s 11). Pursuant to s 9, a licence may be granted as an "operator licence" or as a "tattooist licence". Pursuant to s 10, conditions may be attached to the licence. Detailed provisions relate to information which must accompany an application such as a statement of the applicant's close associates, fingerprinting and palm printing, and investigations. Further information may be sought. Pursuant to s 16 the Secretary may, after considering an application for a licence and the determination of the Commissioner under s 19 on the application, grant a licence or refuse to grant a licence (see s 16(1)). Pursuant to s 16(3) the Secretary, inter alia, must not grant a licence if:

> (b) the applicant is a controlled member of a declared organisation …

14 The term “controlled member” of a declared organisation is defined in s 3(1) of the Act as having the same meaning as that contained in the *Crimes (Criminal Organisations Control) Act 2012*. The Act contains numerous other provisions which are not relevant except for the provisions of s 19(1) which have already been referred to above.

Appellant’s First Ground of Appeal

15 The Appellant submits that the Tribunal erroneously applied a test which put the public interest in priority to any private interest. The basis for such contention is contained in the decision under review where the Senior Member said at [156]:

> … The concept of public interest is designed to give the community’s broader interests priority over private interests. In *Comalco Aluminium (Bell Bay) Ltd v O’Connor* (1995) 131 ALR 657,681 Wilcox CJ and Keely J said: “The purpose of the reference to public interest is to ensure that private interests are not the only matters taken into account; to make clear that the interests of the whole community are matters for the Commissioner’s consideration. The effect of the reference is to amplify the “scope and purpose” of the legislation”.

16 The Appellant submits that the Senior Member misinterpreted the principle which he quoted and relied upon in his decision, since neither the word “priority” nor any derivative thereof appears in the decision in *Comalco*. The Appellant refers to the expanded portion of the decision which was not quoted from *Comalco* at 681 where their Honours said:

> On the contrary, the resolution of industrial disputes being a primary purpose of the Act, the disposal of a dispute in a manner that takes account of the interests of the disputants is plainly within the scope and purpose of the legislation. The purpose of the reference to “public interest” is to ensure that private interests are not the only matters taken into account; to make clear that the interest of the whole community are matters for the Commission’s consideration. The effect of the reference is to amplify the “scope and purpose” of the legislation. But the statute does not direct the Commission as to the weight to be given to the various factors or as to the decision it should make.

17 The Appellant refers to the decision of the High Court of Australia in *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13] where the High Court stated that where a proposition of law is incorporated into the reasoning of a particular Court, such proposition is not binding on later Courts if the Court merely assumed its correctness without argument. Such principle applies even if the proposition forms part of the *ratio decidendi* of the case.

Finding: Ground 1

18 The submission of the Appellant is correct in that *Comalco* does not suggest that priority be given to public interest; however, it makes it plain that the public interest comprises an issue which is of no less importance than private interests and that the community's broader public interests, under the legislation in question in that decision, required a consideration of both interests.

19 The Senior Member at [157] of his decision stated that applying "*a public interest test*" is a matter of fact and degree. The Senior Member referred to the decision in *Director of Public Prosecutions v Smith* [1991] Vic Rep 6; [1991] 1 VR 63 where the Court held:

> The public interest is a term embracing matters, amongst others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interests of an individual or individuals.

20 The Senior Member referred to other decisions which have considered the concept of the public interest such as *Blissett v Commissioner of Police, New South Wales Police Service* [2006] NSWADT 114, [32]; *Constantin v Commissioner of Police, New South Wales Police Force* (GD) [2013] NSWADTAP 16, [33]. In those decisions, the term "public interest" was found to include matters beyond the character of the applicant and included public protection, public safety and public confidence, in the administration of the licensing system.

21 The Senior Member also referred to licensing systems prevailing in occupational regulatory schemes which were, as he said, designed to "help to preserve public confidence in the regulated activity and its members". In this category of decisions, the Senior Member referred to *Health Care Complaints Commission v Do* [2014] NSWCA 307, [34]–[39]; *Kirbach v Health Care Complaints Commission (No.2)* [2015] NSWCA 234, [39]–[40], [45].

22 The Appeal Panel considers, having examined the reasoning of the Senior Member, that by use of the word "priority", the Senior Member was referring only to the fact that the public interest was of equal importance to the private

interests of the Appellant. The Appeal Panel has reached such conclusion after considering the fact that the Senior Member correctly identified the necessity to consider both types of interest. The use of the word "priority" is unfortunate as it can lead to a misinterpretation of the intention of the Senior Member. However, three things must be borne in mind when assessing the whole decision: first, the isolated reference to "priority" forms but a minute part of the whole decision; secondly, the decision as a whole shows that the Senior Member did not elevate public interest above private interest but rather was concerned to ensure that both interests were considered; and thirdly, all aspects of both public and private interest were thoroughly and comprehensively dealt with by the Senior Member.

23 When interpreting decisions of a tribunal, it has been held that such decisions should not be scrutinised with an eye attuned to the perception of error: see *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280. At 287 the Full Court of the Federal Court said:

> The Court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts: *Lennell v Repatriation Commission* (1982) 4 ALN N 54 (Northrop and Sheppard JJ); *Freeman v Defence Force Retirement and Death Benefits Authority* (1985) 5 AAR 156 at 164 (Sheppard J); *Repatriation Commission v Bushell* (1991) 13 AAR 176 at 183 (Morling and Neaves JJ). The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error: *Politis v Commissioner of Taxation* (Cth) (1988) 16 ALR 707 at 708 (Lockhart J).

24 See also *Politis v Commissioner of Taxation (Cth)* (1988) 16 ALD 707 at 708 per Lockhart J. Further, even if it could be said that the Senior Member erred in his application of the test, not every error will lead to an invalidation of the decision: see *Minister for Aboriginal Affairs v Peko-Wallsend* (1996) 162 CLR 24 at 41 where Mason J (as he then was) considered the taking into account of an irrelevant consideration or the failure to take into account a relevant consideration in decision-making.

25 At 40 Mason J said:

> Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision…

26 By analogy, the same principle applies where a decision-maker has taken something into account which he should not have done so.

27 At 41 Mason J said:

> … both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene MR in *Wednesbury Corporation (Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228), that a decision-maker must take into account those matters which he "ought to have regard to" should not be understood in any different sense in view of his Lordship's statement on the following page: the person entrusted with the discretion "must call his own attention to the matters which he is bound to consider".

28 The Senior Member was bound to apply the public interest and the private interest to the matter before him. It is plain from his decision that he did so. The isolated use of the word "priority" does not detract from the overall task of the Senior Member to consider those requirements. For these reasons, Ground 1 of the appeal is dismissed.

Ground 2 and Ground 3

29 These two grounds will be considered together, as they raise the same issue, namely the discretion of the Senior Member in his application of the test to be applied to the issue of the public interest.

30 In ground 2, the Appellant submits that the Senior Member erred in relation to the application of the public interest test by relying upon the decision of *Naziry v Director-General, Ministry for Transport* [2004] NSWADT 40. At [162] of the decision, the Senior Member said:

> The Tribunal should place itself in the position of a member of the public knowing the applicant' associations all record, and consider whether that person would object to having the applicant perform the relevant services: *Naziry v Director-General, Ministry for Transport* [2004] NSWADT 40, [55].

31 *Naziry* raised the issue of whether an applicant was a person of fit and proper character to be issued with a driver's authority, namely a taxi driver's licence. The Appellant submits that the Tribunal was formulating, in that matter, a test as to whether someone was "fit and proper": the focus of the Tribunal was not whether it was in the public interest that such person be awarded the licence.

Accordingly, it is submitted that the Senior Member erred in applying *Naziry* when considering the issue of the public interest.

32 Ground 3 claims that the Senior Member erred in applying the principles in *Health Care Complaints Commission v Do* as being relevant to the issue of "public interest". In that decision, the New South Wales Court of Appeal referred to the objective of protecting the health and safety of the public; that it was not confined to protecting the patients or potential patients of a particular practitioner from risk, but included protecting the public from "*the similar misconduct or incompetence of other practitioners and upholding the public confidence in the standards of the profession*": see Meagher JA at [36].

33 The Applicant submits that the Senior Member erred in considering that the principles referred to in that decision were relevant to considering the question of the "public interest" for the purposes of s 14(b)(ii) of the Act (i.e. whether it would be contrary to the public interest for a licence to be granted to the Appellant). The Appellant points to the different considerations that apply, namely the protection of the public interest in relation to the maintenance of appropriate standards for the regulation of the medical profession whereas under the Act, a different occupation is involved which, the Appellant submits, does not constitute a profession. The Appellant acknowledges that the fundamental purpose of the Act is to rid the industry of criminal or other undesirable elements, however, it was not the purpose of the Act to uphold the public confidence in the profession of tattoo artists in the sense of preventing malpractice, incompetence or misconduct or maintaining professional standards.

Finding: Ground 2 and Ground 3

34 The Act provides a broad discretion to the decision-maker to accept or reject an application for a tattooist licence. In the exercise of the discretion, the decision-maker is required to weigh up whether it would be contrary to the public interest for the licence to be granted.

35 In making the assessment whether an applicant is of fit and proper character (as in *Naziry*), or in the instant consideration, whether the applicant is a fit and proper person to be granted a licence (see s 14(b)(i) of the Act), is an essential

element of that consideration. However, it does not follow that considerations applicable to that issue are not simultaneously matters for consideration as to whether it would be contrary to the public interest for a licence to be granted. There is nothing in the legislation which prohibits the decision-maker from having regard to facts and circumstances that might arise in one category and thereafter paying no regard to those matters when considering another category of consideration. The concept of the public interest is not constrained.

36 As was stated by the High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors* (2012) HCA 36; (2012) 246 CLR 379, the Court said at [42]:

> It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning* [(1947) 74 CLR 492 at 505], when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except insofar as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to many objects the legislature could have had in view".

37 Other authorities have referred to the same principle: see *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, [226], [671]–[673]; *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; 86 NSWLR 527, [299].

38 The Act contains no objects. Accordingly, the task of the Tribunal was to discern the intention of Parliament in enacting such legislation. Clearly, it was intended to introduce and create a system of licensing for tattoo shops; to ensure that extensive investigations were made of persons applying such licences so they could pass the requisite tests of fitness set out in s 14 to hold the licence and also that it would not be contrary to the public interest that a licence be issued to the applicant. As was observed by the Tribunal in *Austin v Commissioner of Fair Trading and Commissioner of Police* [2016] NSWCA 179 at [30], some hint can be discerned from the Act by virtue of the exclusion of a person from holding a licence who is a controlled member of a declared organisation. There would otherwise be no limit on the discretion provided to the decision-maker.

39 In *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 the majority of the High Court at [23]-[26] referred to principles of statutory construction in the context of determining the intention of Parliament. At [25] the majority said, *inter alia*:

> Determination of the purpose of a statute or a particular provision in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure.

40 In *Day v Sanders* (2015) 90 NSWLR 764, the question for determination included interpretation of Harness Racing Rules. At 109 the Court applied the reasoning of Fitzgerald JA in *Hill v Green* [1999] NSWCA 477; 48 NSWLR 161 where Fitzgerald JA at [164] refered to considerations containing a statute which suggest that the legislation provided an exclusive remedy for the regulation of an activity. Basten JA in *Kocic v Commissioner of Police, NSW Police Force* [2014] NSWCA 368, at [33], when discussing the need for gun control, said that the *Criminal Records Act 1991* (NSW) was a control resulting from the Port Arthur massacre. It can be discerned that the Act requiring tattooists' licences results from a need to ensure that criminal elements are excluded from this occupation.

41 In this instance, whilst the Act contains no objects, its purpose intended by Parliament (see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355) is clearly to ensure that any persons who satisfy the requisite tests contained in s 14 of the Act qualify for the issue of a tattoo licence, and that broad discretion is to be provided to the decision-maker.

42 To succeed in this appeal, it is necessary for the Appellant to demonstrate that the decision of the Senior Member was based upon an irrelevant fact, matter or consideration or that he failed to take into account a relevant consideration which he was bound to consider: see *Peko-Wallsend*; see also *Director of Public Prosecutions v Smith* at p 15. On the material presented to the Appeal Panel, and the submissions made by the Appellant, no error which would vitiate the decision has been revealed. Further, no error in the exercise of the discretion of the Senior Member of the kind referred to by the High Court of Australia in *House v The King* (1936) 55 CLR 499 has been shown, of the following kind:

> It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

43 In the absence of the Appeal Panel discerning any error in the decision under grounds 1 to 3 inclusive, it follows that ground 4 does not arise. This ground is solely dependent upon the decision being overturned on grounds 1, 2 or 3. It follows that the appeal is dismissed.

Orders

44 The Appeal Panel makes the following orders:

(1) The appeal is dismissed.

(2) By consent and pursuant to s 64(1) of the *Civil and Administrative Tribunal Act 2013*, publication or broadcast of:

(i) those portions of the decision in this matter that address material filed by the second respondent on a confidential basis, or given at the confidential hearings conducted pursuant to section 49 of the *Civil and Administrative Tribunal Act* on 4 November 2015 and 12 January 2016 are restricted to the second respondent and to the Appeal Panel; and

(ii) publication or broadcast of the above portions of the decision to the public, including the appellant and the first respondent, is prohibited.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar