



## VETERANS' LAW CONFERENCE 2006

**The Hon. Justice Garry Downes AM  
President of the Administrative Appeals Tribunal**

**The Administrative Appeals Tribunal:  
Building on 30 Years of Independent Merits Review**

**27 July 2006**

### **30 Years of Review by the AAT**

The Administrative Appeals Tribunal began its operations on 1 July 1976. It was a Thursday. As Sir Gerard Brennan, the first President of the Tribunal, recalled the occasion, on the Tribunal's twentieth anniversary:

*The doors of the AAT were opened without ceremony. The bare space was interrupted by the occasional desk and powerpoint. The AAT name was on the noticeboard downstairs but months would pass before anybody needed to find it.<sup>1</sup>*

It certainly was a slow start. During its first year of operation, the Tribunal had jurisdiction to review decisions under 44 enactments and received 49 applications for review.<sup>2</sup>

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<sup>1</sup> Sir Gerard Brennan, 'Twentieth Anniversary of the AAT: Opening Address' in J McMillan (ed), *The AAT - Twenty Years Foreword: passing a milestone in Commonwealth administrative review*, Australian Institute of Administrative Law Inc, Canberra, 1998 at 4.

<sup>2</sup> P Bayne (ed), *Administrative Appeals Tribunal: AAT Essays 1976 - 1996*, AAT, Sydney, 1996 at 124.

Within ten years, the Tribunal's jurisdiction had expanded considerably and included the four areas of government decision-making which have constituted the bulk of the Tribunal's workload since that time: social security, Commonwealth workers' compensation, taxation and veterans' entitlements. Today, the Tribunal's jurisdiction extends to decisions made under some 400 pieces of primary and delegated legislation. In the most recent financial year, the Tribunal received more than 8500 applications.

A thirtieth anniversary is a special occasion for any organisation. For an organisation that was such a bold experiment at the time of its establishment, I suggest that it is quite an achievement. The Tribunal was able to fulfil the promise of its creation to provide an accessible forum for individuals to challenge government decisions and to improve the quality of government decision-making more generally. Its success is a testament to the vision of the members of the Kerr and Bland Committees and the work of those who established, and have worked in, the Tribunal over the years.

While the anniversary provides an opportunity to reflect on the past, the Tribunal is also focused on the future and the need to ensure that it continues to provide high quality independent merits review effectively and efficiently. The passage of the *Administrative Appeals Tribunal Amendment Act 2005* resulted in a number of changes to the Act that enable the Tribunal to deal with its caseload more flexibly. The Tribunal has also been active in reviewing aspects of its operations.

Today I would like to talk to you about a number of developments occurring at the Tribunal with a focus on the implications for applications relating to military compensation and veterans' entitlements. First, I will talk about some issues concerning practice and procedure in these areas. Secondly, I will discuss developments in relation to the use of alternative dispute resolution. Finally, I will talk about some issues and developments relating to expert evidence in the Tribunal.

## **Practice and procedure issues**

The Tribunal has jurisdiction to review decisions made under each of the three legislative schemes that provide for payment of compensation and other benefits to current and former members of the Defence Force and their dependants: the *Veterans' Entitlements Act 1986*, the *Safety, Rehabilitation and Compensation Act 1988* and the *Military Rehabilitation and Compensation Act 2004*.

Applications for review under the first two of these Acts continue to be a significant component of the Tribunal's current workload. In the most recent financial year, the Tribunal received approximately 900 applications under the Veterans' Entitlements Act. While this is slightly less than the number of applications lodged in 2004-05, it is considerably less than the approximately 1400 applications received in 2001-02. A gradual decline in the number of applications under the Veterans' Entitlements Act has been evident for some time. In contrast, the number of applications concerning defence-related claims under the Safety, Rehabilitation and Compensation Act has remained relatively steady over the last five financial years. The Tribunal has received between 350 and 420 applications in each of those years.

When the Military Rehabilitation and Compensation Act commenced, the Tribunal anticipated that the new Act may well have implications for the way in which the Tribunal manages military compensation and veterans' entitlements applications more generally. Two years on and perhaps somewhat surprisingly, the Tribunal has only received one application for review under the Act. While the possible implications of the new Act remain therefore in the realm of supposition, the Tribunal has given some consideration to issues likely to arise in this area. Before referring to these, however, it may be useful to identify some of the key differences that currently exist between the treatment of claims under the Safety, Rehabilitation and Compensation Act and the Veterans' Entitlements Act.

The two Acts have quite distinct decision-making frameworks: the use of Statements of Principles under the Veterans' Entitlements Act is a unique feature of that jurisdiction. The processes for seeking review of primary decisions also differ. The Safety, Rehabilitation and Compensation Act provides for internal review while the Veterans' Review Board provides first-tier review for many decisions under the Veterans' Entitlements Act.

In relation to review before the Tribunal, applications under the different Acts are treated as separate jurisdictions with some distinct case management practices. For example, a compulsory conciliation is conducted in most applications under the Safety, Rehabilitation and Compensation Act. Further, applications under the Safety, Rehabilitation and Compensation Act are generally heard in the General Administrative Division while veterans' applications are dealt with in the Veterans' Appeals Division. While this particular difference does not impact significantly on case management, it does affect which of the Tribunal's Senior Members and Members are eligible to hear and determine the different types of applications.

Other differences between the applications under the two Acts include the types of parties and types of representatives involved in proceedings before the Tribunal and the ways in which legal representation for applicants is funded. Legal costs are payable where an applicant is successful under the Safety, Rehabilitation and Compensation Act while legal aid is available for applications under the Veterans' Entitlements Act. These differences have an impact on the way in which applications proceed through the review process.

The Military Rehabilitation and Compensation Act includes aspects of both the Safety, Rehabilitation and Compensation Act and the Veterans' Entitlements Act. Aspects of the decision-making frameworks of both Acts have been adopted. The two avenues for seeking review of primary decisions are available and the different funding models for legal representation of claimants apply. Questions arise as to how such applications should best be managed at the Tribunal. A

further question arises as to whether the Tribunal should deal with all applications relating to military compensation whether under the Military Rehabilitation and Compensation Act, the Safety, Rehabilitation and Compensation Act or the Veterans' Entitlements Act as a discrete jurisdiction.

As those of you familiar with the Tribunal will be aware, most applications are dealt with in accordance with the Tribunal's General Practice Direction. While it has served the Tribunal well for a significant period of time, a number of factors have caused the Tribunal to reconsider whether it is the most effective means of managing the Tribunal's workload.

The Tribunal's jurisdiction is diverse. Clear differences emerge between types of applications made to the Tribunal. These include: the issues that arise for consideration; the kinds of evidence that are usually presented to the Tribunal; the types of parties who apply for review; levels of representation for applicants in different jurisdictions; and the types of representatives who appear before the Tribunal. These differences have an impact on the way in which applications progress towards resolution and raise questions as to the utility of a one-size-fits-all approach.

The General Practice Direction was designed to achieve two main purposes:

- to inform parties generally about the way in which the Tribunal will manage applications for review and provide other general information relevant to the review;
- to impose time limits for undertaking certain steps in the review process such as the lodgement of evidence and Statements of Facts and Contentions.

This second purpose was significant at a time when Conference Registrars who undertake the bulk of the conferences in the Tribunal did not have any power to make binding directions on the parties. Relying on the General Practice Direction to impose requirements on the parties was a convenient way of avoiding the need for members to be involved in making a large number of directions. Since May 2005, however, the Tribunal's Conference Registrars have had the power to make binding directions on parties.

In light of these developments, the Tribunal decided to commence a review of the way in which it manages applications and, in particular, how it is communicating to parties its expectations and requirements in relation to the review process. It seemed to me that parties would be assisted by separating general information about how applications are to be reviewed from the specific requirements about what must be done and by what date in a particular application.

The Tribunal decided that it would review practice and procedure in each of its major jurisdictions with a view to developing a guide setting out general information about the review process in that jurisdiction. Specific requirements to be met in individual applications would be set out in directions made by Conference Registrars or members. The guides will provide the general framework within which the review process takes place. Directions specific to each application will provide greater flexibility for determining the most effective and efficient way of managing the application.

The first part of the review has involved an examination of practice and procedure in the workers' compensation jurisdiction. A draft guide was distributed for comment to Tribunal users in that jurisdiction as well as the broader community of Tribunal users. The comments on the overall approach suggested by the Tribunal were overwhelmingly positive. The Tribunal will be publishing the final Guide to the Workers' Compensation Jurisdiction shortly.

Once the review of the worker's compensation jurisdiction is complete, the Tribunal will consider practice and procedure in the social security jurisdiction. The review of the veterans' jurisdiction will be undertaken after that process has been finalised. Given that the impact of the Military Rehabilitation and Compensation Act is not yet clear, this would appear to be appropriate. In the meantime, defence-related claims under the Safety, Rehabilitation and Compensation Act will continue to be dealt with in the context of the workers' compensation jurisdiction.

The Tribunal expects that it will have dealt with a number of applications under the new Military Rehabilitation and Compensation Act by the time the Tribunal is ready to commence its review of practice and procedure in the veterans' jurisdiction. The Tribunal will then be able to consider how applications under the three different pieces of legislation should best be managed. Pending that review, it will be for the Tribunal in consultation with the parties to determine the most appropriate way of managing applications.

The Tribunal is aware that there may well be circumstances where an applicant will have applications before the Tribunal relating to claims under more than one of the Acts. The Tribunal's usual practice is to deal with multiple applications relating to a single person together. To ensure that applications lodged under any of the three Acts will be dealt with by the same set of members of the Tribunal, I issued a direction in August 2004 that all defence-related claims under the Safety, Rehabilitation and Compensation Act and all applications under the Military Rehabilitation and Compensation Act should be dealt with in the Veterans' Appeals Division. It is anticipated that in the coming months the *Administrative Appeals Tribunal Regulations 1976* will be amended renaming the Veterans' Appeals Division the Veterans' and Military Compensation Division to more accurately reflect the matters dealt with in that Division.

I note with pleasure that the Tribunal continues to have among its members a number of distinguished ex-service personnel who held senior positions in the army, navy and air force. There are also a number of members who are current serving officers in the Reserves. The Tribunal values the knowledge and expertise that these members bring to the Tribunal. It serves to enhance the Tribunal's understanding of issues relating to military service that arise in particular applications and in relation to military issues generally. While appointments are a matter for the Government, the Tribunal anticipates that members with service experience will continue to be among the members appointed to the Tribunal.

### **Use of alternative dispute resolution in the AAT**

The use of alternative dispute resolution has been an integral part of the Tribunal's case management approach for a considerable period of time. In most applications before the Tribunal, the parties attend one or more conferences conducted by Conference Registrars. Compulsory conciliations take place in the workers' compensation jurisdiction where the applicant is represented. The Tribunal also conducts a small number of mediations each year.

Prior to the commencement of the Amendment Act, the AAT Act provided for the Tribunal to conduct conferences and mediations. The definition of ADR processes has been expanded. ADR processes are now defined in section 3 of the Act to mean procedures and services for the resolution of disputes and include: conferencing, mediation, case appraisal, neutral evaluation and other procedures or services specified in the regulations. Arbitration and court procedures or services are specifically excluded.

While the Tribunal has significant experience in relation to conferences, mediation and conciliation, case appraisal and neutral evaluation were not as well known. An Alternative Dispute Resolution Committee comprising members and staff was established within the Tribunal to look at the use of ADR in light of the amendments. The Committee has been examining what is involved in the different processes and how they may best be applied in the Tribunal context.

One of the Committee's first tasks was to develop process models for each of the different types of ADR that are available. Each of the process models follows a consistent pattern. It sets out a definition of the process and then provides a range of information relating to the conduct of the process including:

- the stage of the proceedings at which the process is likely to be undertaken;
- a description of the way in which the process will proceed;
- the role of the person conducting the process as well as the role of the parties and their representatives; and
- what is likely to occur at the conclusion of the process.

The process models will encourage the development of a shared understanding of the nature of the different processes and therefore assist the Tribunal and parties to determine whether a particular type of ADR process may be helpful in the context of a particular application. The process models will also ensure that ADR processes are conducted in a consistent way across the Tribunal. This is particularly important in relation to the less well-known processes: case appraisal and neutral evaluation.

There is no intention that the process models should be followed slavishly. While the different processes are to be conducted within the framework of the relevant model, the precise way in which an ADR event will proceed is a matter for the person conducting the process to determine in the content of the particular matter. The focus will be on adopting a process that is effective for its purpose.

The process models therefore set out how the different forms of ADR will be conducted but they do not indicate when a particular process should be used. For this purpose, the Committee has developed a set of referral guidelines which set out a range of considerations to be taken into account in deciding whether to refer a matter to an ADR process and which ADR process may be appropriate. Relevant factors include such things as:

- the capacity of the parties to participate;
- the attitudes of the parties;
- the nature of the issues in dispute;
- the likelihood of reaching agreement or reducing the issues in dispute; and
- the cost to the parties.

The guidelines identify factors that may make a particular form of ADR suitable for use. For example, mediation may be suitable where flexible options need to be explored or there will be an ongoing relationship between the parties.

I would like to emphasise that conferencing will continue to play the central role in the Tribunal's case management process. Conferences provide an effective forum for exploring the possibility of reaching an agreed outcome while ensuring that applications progress towards resolution. There is no expectation that every application lodged in the Tribunal will be referred to another form of ADR.

A conference will still be the first step in the dispute resolution process. Conference Registrars will have the major role in determining in consultation with the parties whether it would be appropriate to refer a matter to another form of ADR. The Tribunal is keen to ensure that further ADR processes are not an obligatory extra step in the process but are held where they are likely to assist in the efficient and effective management of an application. Of course, for some types of cases, it may be decided that referring all applications to another type of ADR process is warranted. An example is the compulsory conciliation in the workers' compensation jurisdiction.

Tribunal registries will be conducting liaison meetings for regular users over the coming months which will include a discussion about the ADR changes. In the interim, the process models and referral guidelines will be available on the Tribunal's website.

As the Tribunal and users become more familiar with the processes that are available, the Tribunal expects that Conference Registrars, Tribunal members and parties will raise the possibility of referral to a particular form of ADR where they consider it may assist in resolving an application. The Alternative Dispute Resolution Committee will be monitoring the use of ADR and will be seeking feedback from regular users in relation to the process models and the referral guidelines over time.

There would appear to be scope for considering the use of other forms of ADR both in relation to applications under the Veterans' Entitlements Act and defence-related claims under the Safety, Rehabilitation and Compensation Act. For example, case appraisal and neutral evaluation may be suitable in some applications. These processes involve a person providing a non-binding opinion on one or more issues of fact and/or law which are identified as being in dispute. Persons conducting the ADR processes are chosen on the basis of their expert knowledge of the subject matter. Parties may lodge written submissions and make oral presentations as part of these processes or they can be conducted entirely on the papers. The primary purpose of providing the expert opinion is to facilitate further negotiation. However, any written report produced may be admitted in evidence at a subsequent hearing provided that neither party objects to this occurring.

There are a range of circumstances in which these processes may be considered suitable. They may be appropriate, for example, where there is a dispute in relation to a crucial or threshold factual or legal issue and the receipt of an expert opinion may promote the resolution of the application or limit the issues that remain in dispute. If the hearing of the application is likely to be lengthy, the receipt of an expert opinion on the possible outcomes may assist the parties to determine how they wish to proceed.

The Tribunal recognises that a particular issue arises in relation to the use of alternative forms of ADR in the veterans' entitlements area. The legal aid funding guidelines are based broadly on a review process that involves conferences and hearings. Consultation will be required with the Commonwealth and legal aid bodies in relation to the potential for integrating other forms of ADR in appropriate cases as part of the review process in this area. The Tribunal is keen, however, to maximise the options available to resolve applications in the most efficient and effective manner.

### **Issues in expert evidence**

The final area of Tribunal practice that I would like to talk about today is the issue of expert evidence. Expert medical evidence is, of course, a crucial aspect of many military compensation and veterans' entitlements applications. More generally, it is the most common form of expert evidence that comes before the Tribunal. There are two aspects of the use of expert evidence that I would like to touch on. First, the question of the value of single or court-appointed experts and, secondly, the ways in which expert evidence may be given.

Articles on problems with expert evidence usually begin by reciting paragraphs from judgments decrying the extent to which adversarial bias is encountered. A passage from a judgment of Sir George Jessell MR using the phrase “paid agents” is often referred to.<sup>3</sup> Lord Woolf has now joined the list. In his Access to Justice Report, he said this:

*Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.<sup>4</sup>*

The kind of reform which is most popular to address this issue relies upon single expert witnesses, often court appointed. The procedure contended for limits evidence on any field of expert knowledge to one witness either appointed by the court or by the parties under threat that the alternative would be a court-appointed expert.

Before my present appointments, I spent more than 32 years practising at the bar and saw many expert witnesses. I must say that my impression from 32 years of examining expert witnesses and four years of listening to them is that, with very few exceptions, they do not deliberately mould their evidence to suit the case of the party retaining them. When they do, it is obvious. They do expose the matters which support the hypothesis which most favours the party calling them. Provided the matters are legitimate and that any doubt as to the strength of the hypothesis is exposed, I see nothing wrong with this. Indeed, I think this process is one of the great values of the traditional approach to expert evidence. It is exposing different expert points of view for evaluation by the decision-maker.

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<sup>3</sup> *Abringer v Ashton* (1873) 17 LR Eq 358 at 374.

<sup>4</sup> Lord Woolf MR, Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, 1995 at 183.

It seems to be accepted that the best way to determine who said what in a contract negotiation, or what side of the road a motor car was on, is by hearing evidence presented by both sides. The function of a decision-maker is to hear both sides and make findings of fact. Sometimes this is very difficult because memories of conversations are not good or even because the extreme self interest of parties may cause them to tailor an answer. This seems to be accepted as an essential part of the system. There is no alternative. I wonder why expert evidence is thought to be any different.

The fallacy underlying the one expert argument lies in the unstated premise that in fields of expert knowledge there is only one answer. Of course, this is nonsense. First, there may be controversies within a discipline: is social isolation a risk factor in heart disease? Secondly, there may be different schools of thought: Freudian and non Freudian psychiatry. Thirdly, there may be different streams within one discipline: animal behaviourists whose careers have been in zoos may have different opinions to those whose careers have been in the wild. Fourthly, there may be different assumed facts: different histories for a person claiming compensation. Fifthly, even when the relevant body of expert knowledge is not in dispute, one expert may come to a different conclusion from another when that body of knowledge is applied to known criteria. In all these situations, it is for the decision-maker to decide and that person will generally be better able to do that when working with honest expert assistance which nevertheless attempts to present the case from genuinely available differing perspectives.

It follows from the above that I do not share the concerns of some of my colleagues as to the extent of problems with expert evidence. This is not to say that the Tribunal should not develop a practice direction or similar document that sets out the Tribunal's expectations in relation to the use of experts and their proper role in Tribunal proceedings. The Tribunal has identified the development of such a document as one of its future projects. This is also not to say that there

are no problems with traditional methods of adducing expert evidence. Are there other responses which may enhance the quality and utility of expert evidence?

The main alternative to receiving expert evidence in the traditional fashion is concurrent evidence where experts give their evidence at the same time. This mode of receiving expert evidence has been used by the Tribunal in selected cases over a number of years. Its first significant use was in the case relating to the boundaries of the Coonawarra wine region.<sup>5</sup> I used concurrent evidence in a similar case in May this year relating to the King Valley in Victoria. It was also used in the hearing relating to the proposal to import eight Asian elephants for the Melbourne and Sydney zoos.

In these large-scale cases which often involve multiple parties and many experts, the use of concurrent evidence leads to a substantial reduction in the amount of hearing time that would otherwise be required. In the elephants hearing, for example, there were sixteen expert witnesses and three senior counsel to examine them. Their evidence was concluded within four hearing days.

The process has a number of advantages beyond the reduction of hearing time. The evidence in relation to a particular topic is all given at the same time. The issues are generally refined to those that are essential. Areas of agreement are readily discovered and areas of disagreement clarified and explored. Experts are less likely to act adversarially when giving evidence in the presence of peers.

These large-scale cases comprise only a small part of the Tribunal's caseload. To what extent is concurrent evidence appropriate or useful in the Tribunal's larger jurisdictions including workers' compensation and veterans' entitlements?

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<sup>5</sup> *Re Coonawarra Penola Wine Industry Association Inc and Geographical Indications Committee* [2001] AATA 844.

As many of you will be aware, the Tribunal conducted a study in relation to the use of concurrent evidence in its NSW registry over a number of years. The study was completed in November last year. Close to 200 cases were examined for the purposes of deciding whether or not concurrent evidence would be appropriate to use and the technique was used at hearing in almost 50 cases. All but one of the cases were workers' compensation and veterans' entitlements cases involving expert medical evidence.

The main findings of the study provide support for the continued use of concurrent evidence in the Tribunal in appropriate cases. The data collected suggests that the use of concurrent evidence has significant benefits for Tribunal decision-making and does not impact adversely on hearing length in most cases. Tribunal members, representatives and experts expressed general satisfaction with the concurrent evidence process.

The Tribunal will be developing guidelines in relation to the use of concurrent evidence to address a number of the concerns raised by participants in the study and to ensure consistency across the Tribunal. The guidelines will address the identification and selection of cases in which concurrent evidence would be appropriate to use as well as the procedures to be followed in taking concurrent evidence. The Tribunal will invite users to comment on the draft guidelines. Once the guidelines are finalised, the Tribunal will conduct information sessions for representatives and experts in relation to its use. This will assist the Tribunal and parties to use this mode of giving evidence to maximum advantage.

## **Conclusion**

The Tribunal is required to provide a mechanism of review that is fair, just, economical, informal and quick. My aim today was to identify for you some of the areas in which the Tribunal is examining and making changes to its practice and procedure in pursuing this statutory objective. This process of review and change is an important part of ensuring that the Tribunal continues to meet the promise of its creation: to provide accessible, high-quality and independent review of government decisions for individual citizens and to contribute to the overall improvement of the quality of government decision-making. In this way, the Tribunal will build on the legacy of those who developed and implemented the idea for an Administrative Appeals Tribunal.