



## NEW SOUTH WALES STATE LEGACY CONFERENCE

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

**16 July 2005**

September was school holidays in the 1950s. I first met Legacy on a Friday morning of one of those holidays. It was on the corner of Howard Avenue and Pittwater Roads, Dee Why. My mother, who was involved with Torch Bearers for Legacy, was selling Legacy badges.

My great-great grandfather had been a trooper in the famous charge of the Scots Greys at the Battle of Waterloo. My grandfather was blinded landing at Gallipoli on ANZAC Day. My father flew in Hudsons and Catalinas in the last World War. He was one of the last to be evacuated from Ambon.

My father died some years ago but long after I had reached adulthood. My mother has a War Widows' Pension and the much cherished Gold Card. Accordingly, I think I understand the importance of the scheme of entitlements provided for veterans and their dependants by the Australian Government.

The scheme under the *Veterans' Entitlements Act* provides for a range of pensions, allowances and other benefits including medical treatment to compensate veterans and their dependents for injuries and illness caused by defence service. However, the tests of causation in the legislation are very generous in relation to those who have rendered operational, peacekeeping or hazardous service. One provision requires a finding that an injury or illness

was caused by service “unless [the decision-maker] is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination”.

In some cases it may seem that a pension claim has succeeded when the association of the injury or illness with war service is slight. That is the consequence of the generous system provided by the Australian Government which is based on a recognition of the special role played by those who have served Australia. Unfortunately, perhaps, the generosity has limits. Those who fall on the wrong side of the line are inevitably disappointed.

It is accordingly very important that decisions relating to veterans’ entitlements are right. This was recognised as far back as the First World War. In 1915 a form of internal review for decisions relating to veterans’ entitlements was instituted within the Government. As early as 1929 War Pensions Assessment Tribunals and War Pensions Entitlement Appeals Tribunals had been established.

When the Administrative Appeals Tribunal was established in 1976 it provided an appeal system from Government decision-making for the first time in many areas. Such a system had been available with respect to veterans’ entitlements since 1929.

The Administrative Appeals Tribunal now performs an important role in determining veterans’ entitlements. With the establishment of the Veterans’ Review Board in 1985, a right of appeal to the Tribunal from decisions of the Veterans’ Review Board was also introduced.

In its earlier years, the emphasis of Legacy was on care for children. When I was helping my mother sell Legacy badges it was paramount. Things have changed. The emphasis is now more on assistance to widows and dependents. Legacy plays an increasingly important role in looking after returned service men and women and their widows and widowers as their ages advance. I note particularly that Anna Everts, the Manager of Pensions

at Sydney Legacy, and those who work with her, fulfil a very important function in advising on Veterans' entitlements.

More recently still, Legacy has become involved with claims by serving defence force personnel under the military rehabilitation and compensation legislation enacted last year.

The role of Legacy in helping claimants will generally be in the making of an initial claim. Most of these claims are accepted. However, some of them are not. Some of these decisions may be wrong.

These decisions can usually be corrected by an appeal to the Veterans' Review Board which is an independent tribunal presided over by Brigadier Bill Rolfe, a Vietnam War hero from the infantry who ultimately became Director General of Defence Force Legal Services.

There is generally an appeal from the Veterans' Review Board to the Administrative Appeals Tribunal.

During the external review process, a claimant can also ask the Repatriation Commission to undertake an internal review.

After the initial decision is made by the Repatriation Commission, there are accordingly three opportunities for error to be corrected.

The Administrative Appeals Tribunal fulfils two important roles.

First, after a more extensive hearing and careful consideration of the matters than has occurred previously, it seeks to make the correct or preferable decision in the matters that come before it. It strives to achieve individual justice in each case.

Secondly, the principles in its decisions guide other decision-makers, including Departmental decision-makers, so that the quality of decision-

making is improved generally. Errors made once are unlikely to be repeated, even at the lowest level. We call this the normative effect of decisions.

The role of the Administrative Appeals Tribunal is accordingly very important. It is not confined to decisions in individual cases.

Those of you who have been involved in hearings before the Tribunal must have observed the similarity between the Tribunal and a court. You know the old saying: "If it looks like a duck and quacks like a duck, then it must be a duck". But that is not true for the Administrative Appeals Tribunal.

The Administrative Appeals Tribunal makes Government decisions. It is carrying out the same function as the person who made the original decision in the Department of Veterans' Affairs. What is important is that it is making that decision afresh.

The Tribunal is not like a court determining whether there was an error of law. It considers all aspects of the matter and substitutes its decision for all the decisions that have gone before. It is often said that the Tribunal "stands in the shoes of the original decision-maker" and substitutes what it considers to be "the correct or preferable decision" for the decision it is reviewing.

Before a hearing the Tribunal conducts conferences with the parties to explore settlement. If the matter cannot be settled, conferences help to prepare the matter for hearing. An important aspect of the role of the Tribunal is that Government decision-makers and agencies must assist the Tribunal in making its decision. They are not there merely to oppose the veteran's claim.

However, the similarities between the Tribunal and courts are not irrelevant. The Tribunal carries out its role in the manner that courts carry out their roles. It has wider decision-making powers but it determines how it should exercise them in a similar way to a court.

Accordingly, where the parties do not reach agreement as to the outcome, the Administrative Appeals Tribunal is required to hold a hearing and to listen to arguments presented by representatives of both sides before it makes its decision. Its decision must be supported by reasons which are generally made public.

Claimants are protected by all the fairnesses that go with court procedures in a process in which every aspect of their claims is being reconsidered in detail.

What is particularly important about the Administrative Appeals Tribunal is that it is quite independent from Government even though it makes decisions for the Government. Its members are not public servants. They are appointed by the Governor-General, usually for five years. They can only be removed by both Houses of Parliament acting together.

Most importantly, Governments recognise that it is important that bodies like the Tribunal should be independent. Governments may complain from time to time about decisions of courts or tribunals but they recognise the importance of the independence which lies behind such decisions.

The Administrative Appeals Tribunal has 75 members. They include 6 Judges of the Federal Court of Australia, of which I am one, and 2 Judges of the Family Court of Australia. There are Deputy Presidents, Senior Members and Members, both full time and part time.

Many members have substantial military experience. We have Air Marshall Barry Gration, Rear Admiral Tony Horton and at least 5 Brigadiers. Our most recent appointment is Brigadier Gerry Warner, who was Chief of Staff, Land Headquarters in Sydney at the time of his retirement. There are other members with military experience.

The Tribunal can hear cases before panels of 1, 2 or 3 members. Where military issues are important a member with military experience will be included. Where legal issues prevail a legal member will preside. A decision

relating to the way the Tribunal is to be constituted is made by reference to the issues in each matter.

The system of administrative review established by the Australian Government in 1975 which includes the Administrative Appeals Tribunal is unique. There is nothing like it in the rest of the world. Its uniqueness is that there is a general tribunal which acts like a court, is independent of Government and not subject to its direction, but which makes decisions which are substituted for Government decisions.

To my knowledge no other Government in the world has surrendered so much Executive power to independent bodies which are not subject to Government direction or influence. Members of the veterans and services communities can be proud of the Australian system and the institutions such as the Administrative Appeals Tribunal and the Veterans' Review Board which form part of it.

Bodies such as Legacy are to be congratulated for their contribution to the process. I know that Legacy makes available to its community significant advice relating to Veterans' entitlements and entitlements under the new Military Rehabilitation and Compensation system. This includes publications and personal advice.

Legacy assists claimants to prepare and present their claims. At the level of the Administrative Appeals Tribunal, through its lawyers, Dibbs Abbott Stillman (previously Dibbs Barker Gosling), Legacy provides formal legal advice, assistance and even representation.

The veterans and service communities are indebted to Legacy for its service for more than eighty years. I look forward to your continuing that role. When assistance to parties before the Tribunal is involved, the Tribunal itself is a beneficiary.

I wish you well in your deliberations today while I return to less onerous weekend pursuits.