

The Hon Justice David Thomas
President
Administrative Appeals Tribunal

By email only:

16 April 2021

Dear President

As you will be aware, over many months Labor members of the Senate Legal and Constitutional Affairs Legislation Committee (“the **Committee**”) have asked the Administrative Appeals Tribunal questions – in public hearings and on notice – about the remuneration of part-time members.

Based on the material provided to the Committee, it appears that – in some cases – the amounts paid to at least four part-time members could only be justified if those members had completed the equivalent of at least 7 hours of Tribunal work a day for more than five days per week, sometimes for years on end. This is despite at least some of those members working in one or more other jobs.

I am not suggesting that any of those four members, or any other members of the Tribunal, have been over-charging or over-claiming. Rather, based on the evidence of the Tribunal at a hearing of the Committee earlier this week, it appears that the Tribunal has outdated and inconsistent remuneration policies that give rise to the serious possibility that part-time members in some divisions are being paid for more days and hours than they actually work.

As set out below, the appropriateness – and even the legal basis – of those policies is unclear.

At the very least, it is apparent that multiple part-time members are being paid tens of thousands of dollars more than their full-time equivalents are being paid at the Tribunal, despite those part-time members also being engaged in other forms of paid employment. This raises serious questions about whether Australian taxpayers are receiving value for money from part-time members of the Tribunal and from the Tribunal more generally.

In light of the above, I intend to write to the Auditor-General by no later than **24 April 2021** to request that he conduct a comprehensive audit of how part-time members of the Tribunal are being remunerated, including but not limited to the examples, policies and guidelines referred to in this letter.

However, I am conscious that many of the questions Labor members of the Committee have asked the Tribunal over the last 12 months or so remain unanswered and so we do not have a complete picture of how part-time members are being remunerated. For that reason, and because of the seriousness of the matters raised in this letter, I am reluctant to write to the Auditor-General until I have provided the Tribunal with an opportunity to respond to the Opposition’s concerns, which are set out in detail below, and to correct any possible misunderstandings.

I ask that you provide me with a response to the concerns outlined in this letter, including the concern about the legal basis of the Tribunal’s remuneration policies (particularly in respect of the remuneration of part-time members of the Social Services & Child Support division and of “sessional

part-time members" in the Migration and Refugee division), by close of business on Friday 23 April 2021.

Please note that, in the event I decide to proceed with my request for an audit, I intend to provide the Auditor-General with a copy of this letter along with a copy of any response(s).

I also note that any letter I send to the Auditor-General is likely to be made public.

Examples of part-time members being paid more than full-time equivalents

Based on the information provided by the Tribunal to the Committee:¹

- 1) Member Vanessa Plain was paid for working the equivalent of 117 days over the course of the 123-day period between 1 July 2020 and 1 November 2020. This is despite the fact that Ms Plain was also performing a significant amount of work as a barrister over the same period, such as providing pro bono assistance to the Victorian Liberal Party in a high profile legal challenge to public health measures introduced by the Victorian Government.
- 2) In 2019/20, Member Plain – as a part-time member – was paid approximately \$29,088 more than she would have received had she been appointed as a full-time member of the Tribunal.
- 3) In 2019/20, Member Jason Harkess was paid for working the equivalent of 266 days on the Tribunal. There were only 252 weekdays in Victoria in 2019/20 (excluding public holidays).

Moreover, Mr Harkess would have received \$221,700 in 2019/20 had he been appointed as a full-time member – \$70,353 less than he received as a part-time member. According to his public LinkedIn profile, Mr Harkess also held four other jobs over the same period.

- 4) In 2019/20, Member Anthony Barry was paid for working the equivalent of almost 260 days on the Tribunal. There were only 252 weekdays in Victoria in 2019/20

Had he been appointed on a full-time basis, Mr Barry would have been paid \$193,990 in 2019/20 – or \$57,129 less than he was paid as a part-time member who, according to information provided to the Committee by the Tribunal, also held two other jobs.

- 5) Member Louise Bygrave was paid:
 - a. for working the equivalent of approximately 269 days in 2018/19 (despite there only being 250 weekdays in New South Wales excluding public holidays);
 - b. for working the equivalent of approximately 265 days in 2019/20 (despite there only being 253 weekdays); and
 - c. for working the equivalent of approximately 89 days between 1 July 2020 and 1 November 2020 (despite there only being 85 weekdays).

Like Members Plain, Harkess and Barry, Member Bygrave was paid many tens of thousands of dollars more as a part-time member than she would have been paid had she been appointed as a full-time member.

On what basis was the Tribunal satisfied that the members referred to above actually worked the number of days and hours that they were paid for?

¹ Note that the source material for the examples above, which has been provided to the Committee by the Tribunal, is set out in **Attachment A** and **Attachment B**. Further details about the four individual members referred to above – including how the figures have been calculated – can be found in **Attachment C**.

At the very least, these examples raise serious questions about the appropriateness of the remuneration policies that have been adopted by the Tribunal – particularly the policies that apply in relation to the Social Services & Child Support and the Migration and Refugee divisions (being the two divisions where the four members referred to above perform all or the majority of their work).

The Tribunal's Policies

In response to a request from Senator Kim Carr, the Tribunal provided the Legal and Constitutional Affairs Legislation Committee with internal policy documents relating to the payment of members.

Those policy documents raise serious concerns about the confused and inconsistent way in which part-time members in different divisions are remunerated. Given that those documents appear to be based on old and long-superseded determinations by the Remuneration Tribunal, I am also concerned that members in some divisions of the Tribunal – including the four members referred to above – are being remunerated in a manner that is inconsistent with the Remuneration Tribunal determinations that are currently in force. That is, I am concerned that, as a matter of policy, members of the Tribunal are being remunerated in a manner that is inconsistent with the law.

Social Services & Child Support Division (SSCD)

A copy of a document entitled "AAT Guidelines relating to the Payment of Fees to Part-Time Members of the Social Services & Child Support Division (SSCD)" ("the **SSCSD Payment Guidelines**") is enclosed with this letter at **Attachment D**.

The SSCSD Payment Guidelines purport to "outline the rules relating to the remuneration of part-time members of the SSCSD" in accordance with Clause B3.6 of the Remuneration Tribunal Determination 2015/20 ("2015/20 Determination") and Clause 2.5.4(ii) of Remuneration Tribunal Determination 2015/18 ("2015/18 Determination").

On the face of it, the SSCSD Payment Guidelines govern the remuneration of all part-time members of the Social Services & Child Support Division. This is despite the fact that:

1. Clause B3.6 of the 2015/20 Determination clearly applies to Tribunal members, and only to Tribunal members, who were former members of the Social Security Appeals Tribunal prior to the establishment of the amalgamated AAT;² and
2. the 2015/18 Determination is no longer in force.

Note that the footer of the SSCSD Payment Guidelines indicates that the document was approved on "3 November 2016" and has not been updated since.

In other words, it appears the Tribunal is paying part-time members of one of its largest and busiest divisions in accordance with a policy that is more than four years old and which is based on out-of-date, or largely irrelevant, Remuneration Tribunal determinations.

Of most concern is that part-time members of the Social Services & Child Support Division are not required to submit timesheets. Rather, they appear to be paid largely on the basis of formulas that simply assume that members have worked a certain number of days or hours in specified

² A cursory review of the table of current statutory appointments on the Tribunal's website reveals that the vast majority of members who sit on the Social Services & Child Support Division of the Tribunal were appointed after the 2015 amalgamation and so are not "transitional AAT members".

circumstances. So, for example, a member is paid “2 daily fees” for a “Child Support – departure hearing”, irrespective of whether the member actually spent 2 days working on that hearing.

It is difficult to see how such an approach to remuneration can be justified by reference to the Remuneration Tribunal determination. For example, under the SSCSD Payment Guidelines it appears possible that a member who finalises a “Child Support – departure hearing” matter could be paid 2 daily fees and yet only do one – or less than one – day of work. That appears to be inconsistent with clause 34(3) of the applicable Remuneration Tribunal determination, which provides that “[t]he **maximum amount** payable to the office holder for any one day is the daily fee for the office holder”.

The SSCSD Payment Guidelines also appear to be inconsistent with how part-time members of the general and other divisions of the Tribunal (other than the Migration and Refugee Division) are remunerated. As outlined in the document entitled “Guidelines Relating to the Payment of Daily Fees to Part-Time Members of the General and Other Divisions” at **Attachment E**, those members appear to be required to complete timesheets and are only remunerated for the work they actually do.

Migration and Refugee Division

A copy of the document entitled “AAT Guidelines relating to the Payment of Fees to Part-Time Members of the Migration and Refugee Division” (“the **MRD Guidelines**”) is set out at **Attachment F**.

Like the SSCSD Payment Guidelines, the MRD Guidelines appear to be based on an outdated Remuneration Tribunal determination and has not been updated for many years.

As with part-time members of the Social Services & Child Support Division, the remuneration of “sessional part-time members” of the Migration and Refugee Division appears to be based on a formula rather than on the basis of actual hours worked by members (see, eg, paragraphs 11 and 12 of the MRD Guidelines). And, as with the SSCSD Payment Guidelines, it is difficult to reconcile such an approach with the terms of the Remuneration Tribunal determination (see comments above in respect of the SSCSD Payment Guidelines).

The Amalgamation of the Administrative Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal

In her evidence to the Committee this week, Registrar Leathem provided some context for the inconsistent remuneration policies when she noted that “the [remuneration] arrangements were originally developed by the former tribunals, which now comprise the amalgamated AAT”.

However, while that history may explain why there are inconsistent remuneration policies across different divisions, it does not justify it. Nor does that evidence explain how those policies are consistent with the relevant Remuneration Tribunal determination which applies to the Tribunal generally.

It has been over 5 years since the Administrative Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal were amalgamated. Since the amalgamation, many members have sat across multiple divisions of the Tribunal, including the general division, the Social Services & Child Support Division and the Migration and Refugee Division. There is no evident justification for members who have been appointed or reappointed since the amalgamation to be remunerated differently according to the division they happen to sit on from time to time.

Please note that I have copied this correspondence to the Registrar of the Tribunal, Ms Sian Leathem.

I look forward to receiving your response by close of business on Friday 23 April 2021.

Yours sincerely

Mark Dreyfus QC MP
Shadow Attorney General
Shadow Minister for Constitutional Reform

Attached:

- **Attachment A:** Excerpt from the Tribunal's response to Questions on Notice LCC-BE20-167 – LCC-BE20-240
- **Attachment B:** Transcript, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 23 March 2021 (page 85)
- **Attachment C:** Further details about payments made to Members Plain, Harkess, Barry and Bygrave
- **Attachment D:** AAT Guidelines relating to the Payment of Fees to Part-Time Members of the Social Services & Child Support Division (SSCD)
- **Attachment E:** Guidelines Relating to the Payment of Daily Fees to Part-Time Members of the General and Other Divisions
- **Attachment F:** AAT Guidelines relating to the Payment of Fees to Part-Time Members of the Migration and Refugee Division