



Administrative Appeals Tribunal

PRESIDENT'S CHAMBERS
The Hon Justice D G Thomas

23 April 2021

The Hon. Mark Dreyfus QC MP
Shadow Attorney-General
Shadow Minister for Constitutional Reform
Email: Mark.Dreyfus.MP@aph.gov.au

Dear Shadow Attorney-General,

Thank you for your letter of 16 April 2021 outlining your concerns about the Administrative Appeals Tribunal's (AAT) remuneration of part-time members.

Legal basis of the guidelines

The *Remuneration Tribunal (Judicial and Related Offices – Remuneration and Allowances) Determination 2020* provides that a daily fee is payable once a member has undertaken official business of 7 hours duration in aggregate, regardless of the day or days on which that work is done.¹ The maximum amount payable to the office holder for any one day is the daily fee for the office holder.² If the President has given a direction under section 18B of the AAT Act that a member work a specified number of days each week, that member is paid an annual fee on a periodic basis to cover all activities undertaken in performing their duties.³

The guidelines do not purport to supplant the Remuneration Tribunal determinations or encroach upon the Remuneration Tribunal's power to determine the remuneration and allowances of AAT members. Rather, they provide guidance as to how the determinations are to be administered on a practical level.

The *Remuneration Tribunal (Judicial and Related Offices – Remuneration and Allowances) Determination 2020* (and the former relevant determinations) refers to the capacity of an administering authority to issue procedural instructions of the kind referred to in section 8(b) of the Determination. Section 8 provides as follows.

8 Administration of this instrument

An authority administering this instrument:

- a) is to pay to an office holder any annual amount specified in proportion (pro rata) to the office holder's period of service during a year; and

¹ Section 39(2)

² Section 34(3)

³ Section 40

- b) may issue procedural instructions to assist in the implementation of this instrument; and
- c) may elect to apply the same instructions (including policies or procedures in relation to the administration of recreation leave) as the authority does for employees, except where those instructions are not in accordance with this instrument.

In addition to the above, section 34(2) provides that the nature, reasonableness, and duration of official business undertaken by a member is to be reviewed prior to payment, in accordance with arrangements established by the AAT. These provisions form the basis upon which the AAT can develop and issue internal guidelines on the administration of part-time member remuneration. Our interpretation of these sections has been confirmed in advice sought from the Australian Government Solicitor.

We acknowledge the cross-references in the internal guidelines to the Remuneration Tribunal determinations are out of date and concede we should have been more vigilant in updating the references. However, it is important to emphasise that the determination currently in force is materially the same in all relevant respects. The only major recent change was the removal of a part-time member's entitlement to an annual minimum payment in circumstances where no work was available for that member, which applied to members appointed post-amalgamation and ceased on 31 December 2018. The Tribunal's payroll team actively monitors changes in the determinations and ensures that any changes in salary or daily rates are applied consistently with the determinations currently in force. Whenever material changes are made to the determinations, we seek external advice to ensure our interpretation is correct. Notably, the nature of the work undertaken by members since amalgamation remains unchanged.

Part-time members may earn more than full-time members

From amalgamation, the determination explicitly exempted part-time AAT members from the general requirement that part-time office holders may not be paid more than the base salary of the equivalent full-time office in respect of any financial year.⁴ Relevantly, this general requirement was removed entirely from the determination from 1 July 2018.

The determination applicable to part-time members of the former Social Security Appeals Tribunal (SSAT) previously included a clause which capped part-time members' earnings.⁵ We understand this clause was removed in 2011 at the SSAT's request on the basis that it effectively imposed a limit on the number of reviews a part-time member could complete over a year.

As such, the only limitation imposed by the Remuneration Tribunal's current determination on a part-time member's earnings is that they may only be paid up to a maximum of one daily fee per day. Should there be sufficient work available, theoretically a part-time member could undertake work up to 365 days per year, should they be willing and available. In contrast, taking into account recreation leave entitlements and public holidays,

⁴ See section 2.3 of Determination 2015/10: Judicial and Related Offices – Remuneration and Allowances.

⁵ See clause A35 of Determination 2010/11: Remuneration and Allowances for Holders of Part-time Public Office.

full-time members are generally considered to be available for approximately 230 days per year. Having regard to the current backlog of cases in the AAT, the removal of this limitation provides the AAT with a useful tool to facilitate surge resourcing of matters.

Actual days worked by part-time members

The guidelines that apply to the remuneration of part-time members of the SSCSD and for a cohort of part-time members in MRD, specify that they are paid upon the finalisation of a case. A cohort of approximately 30 barristers were appointed and assigned to the MRD at the Tribunal's request in 2018 for a 4-year term to provide surge capacity in the Division, although a smaller number have been actively and consistently engaged over the past few years. The number of daily fees, or proportion of a daily fee, paid to these members on finalising a case represents the standard time allowed to finalise that type of case. This encompasses all work a member undertakes from allocation to finalisation, including preparation, seeking further information, hearing, and writing reasons for the decision. These part-time members do not currently submit timesheets, rather their pay claims are triggered by the finalisation of a case.

As payment is triggered by the finalisation of a matter, there is no need to capture the days on which the part-time members actually undertake work. This is because the case weightings, which inform how much a member will be paid to finalise particular cases, represent the amount of time considered reasonable and proportionate for a member to undertake all work in respect of a case. Members who are paid under these models only receive payment once they finalise a case, but that does not mean that they have only undertaken work on that case on a single day. Reflecting the notion of the aggregation of time to earn a daily fee under the Remuneration Tribunal determination, a member's work could span several periods of time over multiple days. Indeed, given some reviews may take several months from constitution to finalisation of decision, some of the work undertaken on a matter may have occurred in a previous financial period. The remuneration they receive is linked to the number of applications they have finalised and is therefore reflective of their output.

Planned improvements to the administration of part-time member pay

Each of the former tribunals had developed remuneration guidelines and systems to reflect their varying caseloads and different ways of organising their members to undertake work. Notwithstanding the amalgamation, the nature of the caseloads and the legislated review processes members undertake has not actually changed post-amalgamation. However, we agree the AAT's current internal arrangements for administering part-time member remuneration require updating to ensure greater consistency across divisions, to reduce the administrative burden associated with their management, and to support the efficient allocation of work to cross-assigned members. In fact, this was identified as one of the major strategic priorities by the AAT's leadership group in late 2019 after many months of consultation and planning. We have been steadily working towards achieving this since that time.

Work commenced on the creation of a single pay system for all part-time members of the AAT in 2019. Unfortunately, with the arrival of the pandemic in early 2020 and the need to focus all efforts on the maintenance of service delivery during that period, there was a delay in finalising and implementing the new arrangements. However, that work recommenced in early 2021 and we expect to roll-out the new arrangements in the next financial year.

The new arrangements will utilise an electronic timesheet system, based on the arrangements that have been operating for the majority of part-time members in the MRD for many years. We will also take the opportunity to improve other aspects of the administration of part-time member remuneration, such as developing additional mechanisms for reporting and analysis. We are about to embark on the testing phase of the new system and will be engaging our independent internal auditors to review and recommend any refinements before the roll-out next financial year. We will keep you informed of the steps taken leading to the roll-out.

We remain on track to implement the new part-time member remuneration arrangements next financial year. We acknowledge your reference to a possible referral to the Auditor-General and suggest that would be most beneficial once the new arrangements have been in place for a reasonable period of time.

Deputy President Jan Redfern, the Registrar and myself would like the opportunity to provide you with a more comprehensive briefing about the AAT's operations. We would be happy to come to Canberra in the week of 10 May 2021 if that is convenient. This has been cleared with Assistant Minister Stoker.

Yours sincerely,

Justice D G Thomas