

**Submission to the Senate Standing Committee on Legal
& Constitutional Affairs
Attorney-General's Portfolio
Additional Estimates 2020-2021**

I have been asked by a delegate of the AAT Registrar Ms Sian Leathem, Mr Jamie Crew, National Director of the AAT, if I wished to contribute any additional information in relation to a series of questions asked by the above committee on the bases of my former position as an AAT Member which concluded on 29 September 2020. His e-mail was dated 1 December @ 7.51 pm 2021 and received by me on 2 December 2021. I was told the e-mail was sent to me as my name appeared variously in answers relating to the Committee's questions.

The e-mail related to issues, amongst other things, such as *member performance* and *benchmarks*. My comments only relate to these 2 terms.

I was asked to submit any additional information by Monday 6 December 2021. This submission is a response to that invitation.

I am now, after some 5 years plus at the AAT, partly familiar with these 2 terms, *member performance/benchmarks*, but this came only gradually over a period of time since I commenced my appointment at the AAT on 1 July 2015 and when, soon after, regular member statistics began to pop up via one's personal computer, without explanation but on a regular basis. The statistics did not generally appear for promotional member positions except where a Senior Member was a part of a member team. Otherwise, it was information provided to ordinary members. Unfortunately, ordinary members were forced to view other member statistics, presumably to create a competitive edge for *performance*. Something like a performing seal, or, indeed, greyhounds chasing a lure (*viz benchmark/targets*). Not a very professional way to treat government statutory appointees.

I am unaware of the detail provided or otherwise implied by or within the terms, *performance/benchmarks*, as there was no explanation ever given to me as to who determined such standards, their possession of expertise/experience to set them, if there were standards, how they were relevant to a particular member's current list, on what they were based and if there was specific criteria, what they were, order of priority and what weighting they were given and why. I was never informed of what a *case day* was.

It was always fascinating to observe how often benchmarks/targets changed – often when the wind changed direction. If there was a reason for target adjustments, the reason given was always quite opaque, brief and not clear. For the most part benchmarks only ever increased and never decreased – except with the advent of the pandemic.

I regularly asked the above questions which were from an unknown source and marked *no reply*, via return e-mail initially when I first received these so called *performance* statistics, initially at operational level but the queries were ignored. I then *e-mailed* these questions at Presidential level. Again the e-mails were ignored. This lack of conversation or explanation of the statistics remained unanswered.

Over time it became obvious that these statistics could be manipulated to say what you wanted them to say. It was a very subjective and very public way of controlling members, keep them from discussing any genuine concerns with the faceless administrators who determined allocations and standards while deciding what applications were regarded as *easy* and what were *complex*.

In this environment I was forced to view other members' *performance/benchmarks*. It was clearly a breach of a member's operational privacy and more importantly a direct attack on

members' independence. It was a unveiled effort to control and manage members, their individuality, deny them robust debate on the veracity or otherwise of performance/benchmarks and a blatant attempt by senior administrators to ultimately control member renewal/appointments in the long term.

The above criticisms of the Tribunal, amongst others, were all supported by the *2018 AAT Statutory Review* by former High Court Judge, the Honourable Ian Callinan, where he unhappily concluded that there *was friction* at the Tribunal. Whilst I do not support all of the recommendations of the Review, it is the only apolitical assessment of the problems associated with the Tribunal. Few of its recommendations have been implemented. It did, however, recommend a position at Deputy Presidential level to assist with the future management of the Tribunal by someone at either judicial level or had held a mix of judicial/merits review roles within other forums, such as, Tribunals.

If one has extensive experience in Tribunal law and had full-time experience as a Tribunal Head both at judicial level within both merits review and *de novo* jurisdictions, as I have plus if one possesses a modicum of reasonable research skills, it was easy to discover that AAT promotional positions were treated quite differently than ordinary members and had easier workloads than the latter. Promotional level members were treated more respectfully in terms of *performance/benchmark/targets* than ordinary members who carried the bulk of matters especially in the MR Division (MRD), the latter of whom were rarely asked to give genuine feedback – members fully aware that there would, in all probability, be adverse consequences at renewal time if one was too open and up-front or, indeed, engaged actively in robust critical commentary of the Tribunal in any real meaningful way.

The interference in member independence, via the senior public service via performance/benchmark control was palpable. This comment does not relate in any way to the ordinary AAT public servants who gave outstanding support and assistance to me over my years at the Tribunal.

MRD performance/benchmark targets can be achieved without cutting across the independence of statutory members. In my own role as a former NSW Tribunal head I set *caseload timeline guidelines* for various categories of matters. This strategy's benefit was that it respected the principle of member independence but avoided mental health issues which some AAT members suffered because of crippling targets in some lists while keeping the final resolution of matters on an even keel.

Caseload information should be easily accessible both for members of the public, applicants and special interest groups such as standing committees as the AAT is a publicly funded organisation.

In regard to myself at the AAT I am well known for never having outstanding decisions. One of the earliest initiatives I introduced at the Tribunal was known as the Oral Student Hearing List in 2017/18 (*viz* all decisions delivered *extempore*) which made my decisions output remarkably high.

As time went by I was also often asked at Presidential level to assess other MRD initiatives that were recommended by Members (including promotional positions) and to advise on whether they complied with the Tribunal's role and jurisdiction, was supported by its legislative framework and to ensure that no AAT applicants were never disadvantaged in terms of their rights and entitlements under Australian law. I continued in this informal role as Tribunal Adviser (*viz Counsellor*) up to the time of my departure in 2020.

Please note these advices/initiatives were undertaken in addition to any normal caseloads I was carrying at the time and did not result in any reduction in my individual caseloads or

attracted extra remuneration. Please see attached Annexure B's last page for a selection of some of those advices and initiatives.

In December 2019 I was invited to attend an interview for a new member position as I already had indicated at Presidential level that I would not be seeking renewal of my ordinary Member position. As a result, I attended this interview on the basis that the position would be at either Deputy Presidential level or, in the alternative, Senior Member level. Both of these type of positions were also in keeping with the spirit of the Callinan Statutory Review which suggested a number of promotional positions including that of a senior judicial/ merits review member position to assist with the management of the Tribunal.

The interview was conducted on or about 12 February 2020 and, amongst others, was constituted by a number of judges who had nothing to do with the Tribunal and had been appointed on the basis of their independence. I made a written submission for this interviewing panel which essentially drew on my public record as a Tribunal specialist. During the course of that interview I indicated that I would be interested in any promotional position above that of ordinary member level that the panel might recommend. At the conclusion of that interview the Chair of that Committee, a retired Supreme Court Judge, walked me to the lift and stated that the Government would specifically inform me of its decision on the promotional position. I understand I was the only member not to seek renewal of an existing ordinary member position.

I have not heard the outcome of the government's decision for the promotional position. I did, however, receive government correspondence referring to me, inter alia, as Senior Member Hoeben in the weeks prior to my departure in September 2020 while also being referred to, orally, by some colleagues as Senior Member Hoeben.

This has created some anxiety and confusion over the past year and I need clarification.

The outstanding question in my mind is: has there been sighted by anyone at the Tribunal an instrument of promotional member appointment for me, signed by both the then Attorney-General the Honourable Christian Porter and the Governor-General the Honourable General David Hurley and dated in or about the year 2020.

To assist the Standing Committee I have included in this submission 3 annexures which will assist the panel by giving it a thumbnail sketch of who I am and my background:

1. Annexure A which is an abridged version of my CV;
2. Annexure B which is a recently drafted generic version of the criteria for the position of either AAT Deputy President or, in the alternative, Senior Member which would assist the Standing Committee to have some detail given to Annexure A;
3. Annexure C my farewell to the ordinary AAT public servants dated who supported and assisted me during my time at the AAT and its contents which outlines one of the positions for which I applied and interviewed on or about 12 February 2020; and
4. Annexure D being a list of my Selected Judgments and Decisions.

Geraldine Hoeben

6 December 2021