

**REMUNERATION TRIBUNAL
STATEMENT**

**MAJOR REVIEW OF JUDICIAL AND
RELATED OFFICES'
REMUNERATION**

NOVEMBER 2002

REMUNERATION TRIBUNAL STATEMENT

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EXECUTIVE SUMMARY

Australia has a world class judiciary, whose quality and dedication benefits all Australians. The Australian judicial system needs to be fostered and maintained in the national interest.

The nation's judicial system provides a major contribution to Australia's social and economic structures. It has an impact at all levels of society, from the interests of individuals and their families through to corporations and governments. The judicial system provides the legal underpinning for our society and enables people to go about their daily affairs protected by the rule of law.

For an individual, the judicial system plays an important role in giving effect to private contractual arrangements. More broadly, an effective and efficient judicial system plays an important role in ensuring confidence in the regulation of all levels of the economy and in turn, the ongoing economic prosperity in Australia. The Australian Law Reform Commission (ALRC) in its report: *Managing Justice: A review of the federal civil justice system* (2000) (ALRC 89) (Managing Justice (ALRC 89)) recognised the multiple functions of the justice system, and noted the significant contribution to the economy, including as a key export, that an effective judicial system provides.

The Remuneration Tribunal ('the Tribunal') also notes the changes to practice and operations undertaken by the federal judicial system, placing Australia at the international cutting edge of judicial reform. The Tribunal observed that the federal judiciary has managed and dealt with growing demands, increased workload, the complexity of issues and the responsibility to deliver decisions, often quickly in a context of growing public scrutiny and interest. The Tribunal recognises that there has been a change in the nature of judicial work. Lower level courts and tribunals are now dealing with the less complex, high volume caseload work. The superior courts are managing cases with higher levels of complexity and diversity, such as those related to the 'new economy', including intellectual property, information technology, biochemistry, gene technology and the implementation of competition principles.

Set against the increased workload of the courts and tribunals, the Tribunal was also concerned with the erosion of purchasing power since the establishment of the High Court in 1901, particularly when viewed against the constitutional provision that judicial remuneration shall not be diminished during a judge's continuance in office.

The Tribunal was also presented with material outlining the 'relentless nature of judgement writing' faced by the courts and tribunals, and the long hours worked by judges, magistrates and members of tribunals. The Tribunal considers that courts and tribunals should be properly resourced so that adequate support is provided.

In arriving at its final views and the Determination that results from the review of judicial and related offices' remuneration ('the Review'), the Tribunal has sought to balance the various arguments and material placed before it, whilst ensuring that adequate and appropriate remuneration outcomes continue to protect and promote an independent judiciary. The Tribunal has also taken into account the broad range of elements that provide a context for the consideration of judicial and related offices' remuneration. These include status, salary, pension, tenure and the nature of public service. An independent judiciary is an essential element of good government. The Tribunal, in its deliberations, was mindful of the important role remuneration plays in attracting and retaining high quality people to the judicial system.

Judicial Offices

Arising from the Review, following its consideration of all the material placed before it, the Tribunal has determined that there should be the following three increases in judicial remuneration. The first increase arising from the Review will be 7% for judicial office holders and is to take effect from 1 July 2002. The second and third increases for judicial office holders arising from the Review are to be implemented in two instalments of 5% from July 2003 and 5% from July 2004. These latter increases in 2003 and 2004 are independent of the Tribunal's annual review of judicial remuneration, required under sub-sections 7(3) and 7(4) of the *Remuneration Tribunal Act 1973* (the RT Act), which are based on relevant economic indices. The timing of the above increases takes into account the delay in the receipt of some key submissions which meant that the Review could not be finalised by the originally planned date of March 2002.

Related Offices

For the related offices, that is non-judicial offices such as registrars, Chief Executives of the courts and offices of tribunals, the Tribunal has determined an increase of 3.1% based on wages growth as measured by the Wage Cost Index (WCI). This increase is to take effect from 1 July 2002, consistent with the implementation of increases for judicial offices. The Tribunal will consider future increases for related offices as part of its next annual review as required under sub-sections 7(3) and 7(4) of the RT Act.

The Tribunal has also determined certain other changes to individual offices and other conditions which are set out in the Statement and in the accompanying Determination.

1. BACKGROUND

In October 1999, the Tribunal announced its intention to conduct a comprehensive review into the remuneration of judicial and related offices ('the Review') during the course of 2001. That proposal was confirmed on 14 October 2000 in the statement accompanying the Tribunal's determination of adjustments in judicial and related offices' remuneration (Determination 2000/13).

A Discussion Paper for the Review was released in July 2001. That paper can be accessed at (http://www.remtribunal.gov.au/Home/det_2001_23_statement.html). Submissions to the Review were sought by the end of October 2001. The delay in receipt of some key submissions meant that the Review could not be finalised by the originally planned date of March 2002. The Tribunal accepted submissions until 31 October 2002.

2. GUIDING PRINCIPLES OF THE REVIEW

The last major Review of judicial and related offices in 1994 used five guiding principles for the consideration of judicial and related offices' remuneration: independence, recruitment and retention, workload and related factors, comparative remuneration data and economic circumstances. The Tribunal has been mindful of these principles in undertaking the current Review.

The Tribunal has also taken the opportunity to consider the applicability of flexible remuneration arrangements – increasingly available to senior private and public sector offices – to judicial and related offices. That included consideration of arrangements such as performance pay, a move to a Total Remuneration (TR) approach, with accompanying scope to cash out certain entitlements and modify the make-up of a remuneration package to meet individual circumstances.

Constitutional provisions and the requirement to safeguard independence mean that the availability of some of these flexible remuneration arrangements is not appropriate for judicial offices. However, the current *Judicial and Related Offices' Determination* (Determination 2001/23 as amended) covers a range of statutory offices, enabling scope for greater flexibility, particularly for non-judicial offices.

The Tribunal considers a 'one-size-fits-all' solution is restrictive and may disadvantage some offices. That view has led to the tailoring of remuneration arrangements for different groups of statutory offices within the Determination.

The remuneration of all judicial offices appointed under the Constitution has been the primary focus of the Review. A number of related offices, including the Chief Executive Officers of the respective federal courts and non-judicial members of the various tribunals and commissions were also considered by the Tribunal as part of the Review.

3. CONDUCT OF THE REVIEW

3.1 Discussion paper

On 7 May 2001 the Tribunal circulated a draft discussion paper outlining various issues, approaches and options for consideration in the Review. The draft paper was forwarded to the High Court of Australia, the Federal Court of Australia, the Family Court of Australia, the

Federal Magistrates Service (the FMS), members of the Judicial Remuneration Coordination Group involving representatives of the Tribunal's counterparts in state and territory remuneration tribunals and the Commonwealth Attorney-General's Department. The Tribunal considered the comments received on the draft paper, which was revised prior to its public release in July 2001.

The Review was advertised in August 2001 in national and major metropolitan newspapers. Submissions were invited from interested organisations and individuals, and the Discussion Paper's availability on the Tribunal's web site noted.

3.2 Parties consulted

The Tribunal received 17 written submissions to the Review. A list of these submissions is at **Appendix 1**. The Tribunal also wrote to all state and territory Attorneys-General and Chief Justices of state and territory Supreme Courts in April 2002 to advise of the Review and to invite comment.

In the course of the Review, the Tribunal consulted with public and private sector individuals and organisations. In July 2002 the Tribunal met in separate private sessions with:

- the Chief Justices of the Family Court and the Federal Court, and the Chief Federal Magistrate;
- the Registrar of the Federal Court (also representing the Chief Executive Officer (CEO) and Principal Registrar of the High Court and the CEO of the Family Court), and the CEO of the FMS;
- the Presidents of the Administrative Appeals Tribunal (AAT), National Native Title Tribunal (NNTT), ALRC, and a Deputy President and a Senior Member of the AAT; and
- the President and Executive Director of the NSW Bar Association.

The Tribunal met and discussed the Review with representatives of its counterparts in the state and territory remuneration tribunals on 31 July 2002.

3.3 The Tribunal's powers

The Tribunal has undertaken the Review in accordance with sub-sections 7(3) and 7(4)(a) of the *Remuneration Tribunal Act 1973* (the RT Act). In undertaking its inquiries, consideration of submissions and discussions with interested parties, the Tribunal has been mindful of its role as established in the RT Act.

3.3.1 The Tribunal's performance of its functions

In undertaking the Review, the Tribunal sought to exercise its powers in a responsible and consultative manner. Section 11 of the RT Act sets out the manner in which the Tribunal may perform its functions. That section provides:

- '(1) In the performance of the functions of the Tribunal:*
- (a) the Tribunal may inform itself in such manner as it thinks fit;*
 - (b) the Tribunal may receive written or oral statements;*
 - (c) the Tribunal is not required to conduct any proceeding in a formal manner; and*
 - (d) the Tribunal is not bound by the rules of evidence.'*

The role of the Tribunal was considered recently by Miss Stephanie Forgie, Deputy President, AAT during a Freedom of Information matter. The Deputy President stated:

'The Remuneration Tribunal is not a court. It is not a tribunal reviewing decisions or resolving disputes between parties, whether in the public or private sector. Instead, it is a body with a mixture of determinate and recommendatory functions.'

(page 20, V2002/779, 22 August 2002)

During the Review, the Tribunal was questioned by the Family Court on the procedures of inquiry the Tribunal was using, and whether it was required to release submissions it had received. In addition, the Family Court argued that the Tribunal must have regard to Australian Industrial Relations Commission (AIRC) principles relevant to the setting of paid rates awards.

3.3.2 Constitutional matters in relation to judicial remuneration

The Family Court submitted to the Tribunal that the current level of judicial remuneration threatened the safeguard of judicial independence provided by the Constitution, with diminution of remuneration having occurred through inflation, political interference and the application of the superannuation surcharge. Having obtained legal advice the Tribunal considered that the relevant submissions did not establish that there had been any breach of sub-section 72(iii) of the Constitution, which expressly prohibits diminution of a judge's remuneration while the judge remains in office. In addition, having received legal advice the Tribunal was of the view that it had not breached any relevant constitutional doctrine in relation to the fixing by the Parliament or the Tribunal of judicial remuneration.

3.3.3 AIRC principles and decisions of wage determination

Sub-section 5(1) of the RT Act sets out the functions of the Tribunal and indicates that these functions should be performed *'having regard to:*

(a) the Principles of Wage Determination established from time to time by the Australian Industrial Relations Commission; and

(b) decisions given from time to time by the Australian Industrial Relations Commission in National Wage Cases.'

In undertaking the Review, the Tribunal has taken into account the AIRC's principles of wage determination and the AIRC's decisions in National Wage Cases, as required under the RT Act, including the paid rates awards principle.

3.3.4 Paid Rates Award Principle

The Family Court argued that the Tribunal must fix remuneration of the federal judiciary in accordance with the relevant 'principles' of the AIRC, and that such an approach required application of the paid rates principle where the parties are unable to bargain. The Family Court contended that for the application of the principle, the relevant market (one of the elements of the paid rates principle) was the senior Bar.

The Family Court argued in written submissions and orally that the paid rates principle should be applied. Having obtained legal advice, the Tribunal is of the view that it is required to *have regard* to the content of sub-section 5 (1) of the RT Act, that is the AIRC Principles of Wage

Determination and the decisions of National Wage Cases. The Tribunal is not required to apply either the Principles of Wage Determination or the methodology used by the AIRC. It is ultimately a matter for the Tribunal to determine the weight that should be given to the Principles and decisions of the AIRC.

The Tribunal has been mindful of all parties' written submissions and material presented during discussions. However, the Tribunal does not accept the argument that it *must* apply paid rates principles (or any other specific wage fixing principles). The Tribunal is strengthened in these views by the legal advice and other submissions it has received during the Review.

Having considered the notion of the paid rates principles, the Tribunal does not accept that the relevant 'market' is limited to that of the senior Bar. The senior Bar may well be the principal market from which judges are drawn to the court(s), but judges are appointed also from other markets. The relevant 'market' for the purposes of the paid rates principle is the market in which the relevant persons function – not the market or markets in which they may have worked previously. Therefore, with respect to the submissions made by the Family Court, the Tribunal:

- rejects that it is required by the RT Act to follow and to apply either the Principles of Wage Determination or the methodology used by the AIRC; and
- rejects the submission that the relevant 'market' for the application of the paid rates principle is the senior Bar, while acknowledging that the senior Bar may well be the market from which persons are drawn principally (but not exclusively) to become judges. Once appointed, the relevant 'market' is the market defined by the terms and conditions of the judges themselves.

It therefore follows that submissions and surveys regarding salaries and conditions of certain members of the senior Bar have given the Tribunal material to which it is pleased to *have regard*, but not remuneration arrangements which the Tribunal *must* adopt.

4. KEY ISSUES

A number of issues emerged during the Review from the written submissions and from discussions. The five key themes arising were recruitment and retention, the quantum of increase, relativities within the federal jurisdiction, recognising performance and flexibility.

4.1 Recruitment and retention

4.1.1 Recruitment

Courts and tribunals consider that current remuneration levels are a disincentive to the recruitment of suitable candidates to serve as judges and related offices. This was stressed particularly with respect to judicial appointments, given the significant disparity between judges' salaries and income that can be earned at the senior Bar. It was argued by the courts and tribunals that while the current remuneration level may not impact on the calibre of those appointed it does restrict the pool of quality candidates, and especially limits the ability of courts and tribunals to attract younger members.

The Victorian Bar Association argued that recruitment difficulties were highlighted by recent comments made by Victorian Attorney-General Robert Hulls in June 2002. Mr Hulls was

reported to have stated ‘I have to approach at least half-a-dozen people and get half-a-dozen knock backs before I can appoint someone’, linking this to the reality that some people are not prepared to lose higher remuneration until later in their careers. The Victorian Bar Association stated that this was the first occasion they were aware of an incumbent Attorney-General speaking so frankly on this issue.

The Chief Justice of the Family Court used as an example of the difficulty of recruiting judges the Commonwealth’s difficulties in replacing a judge for the Sydney Registry. A judge retired in July 2000, but the extensive consultation that was needed by the Attorney-General to find a suitable candidate meant that a replacement was not appointed until fifteen months later in October 2001.

The Chief Justice of the Federal Court held similar views about the difficulties with recruitment. He observed in discussions with the Tribunal that senior barristers eminently suitable for appointment to the Federal Court, when approached about their availability for consideration for appointment, often declined the invitation because of economic considerations.

The Attorney-General, on behalf of the Commonwealth, considered it doubtful that the level of remuneration was a key factor in most decisions to accept or reject judicial appointment. The Commonwealth submitted that remuneration could not be considered separately from such elements as tenure, status, leave and pension entitlements.

The Federal Court submitted:

‘The views of the Attorney-General and the Chief Justice can be reconciled. Both agree that recent appointments to the Federal Court have been appointments of outstanding and eminent members of the legal profession and that there have been no difficulties in attracting appointments of the highest calibre. However, there are still persons eminently suitable for appointment and of a younger age, who will not consider appointment because of a number of reasons which include the inadequate level of remuneration.’

The Tribunal wishes to note that while quality appointments continue to be made at all levels of the judiciary, this situation should not be taken for granted. Responsible remuneration outcomes for the judiciary should not be based at the lowest possible level: such an approach represents false economy. Equally, seeking to compete with the shifting sands of the market elite which operates in a competitive environment is also an inappropriate basis for setting judicial remuneration, particularly against the constitutional provision that judicial remuneration shall not be diminished during a judge’s continuance in office. Remuneration is not the sole factor that influences an individual’s decision to accept or reject judicial appointment. Other factors would include workload pressure, health issues, lifestyle choices, a desire for change, a sense of public duty, conditions such as leave and the judicial pension. In conclusion, the Tribunal considers that while there have been some difficulties in recruitment, on balance there have been no major impediments to attracting quality candidates to the courts and tribunals.

4.1.2 Retention

The Commonwealth's submission noted that in the last 10 years, only three federal judges have resigned before reaching age 60, the minimum age at which a judicial pension is payable. All three resigned to take up state judicial appointments. As the remuneration for state judicial office was comparable, the Commonwealth considered that the level of remuneration did not seem to have been a factor in their decisions.

The Federal Court provided material indicating that between January 1990 and February 2002, twenty-two judges of the Federal Court retired or resigned their appointment and one died in office, including:

- four who were under 60 years of age accepted other judicial appointments;
- three who were over 60 years of age accepted part-time judicial appointments;
- three who were 70 years of age accepted acting judicial appointments;
- one judge retired at 66 years of age and became an arbitrator;
- another judge retired at 63 years of age (after 20 years on the bench) to assume a banking position;
- one judge passed away shortly after his resignation;
- one judge retired at 62 years of age, presided over a Royal Commission and became Chancellor of a University; and
- one judge retired at 70 years of age and has conducted Inquiries.

The Tribunal considers that the information available to it does not support conclusions that remuneration is a major factor in the retirement of members of the federal judiciary. Retirement decisions appear to be influenced by a variety of factors including career choices, age, lifestyle preferences and health. While remuneration is an important consideration in the retention of judges, the Tribunal considers that consistent with the conclusion of the 1994 Review, retention is not a factor of significant weight in the assessment of judicial remuneration.

4.2 Quantum of increase

In considering an appropriate remuneration increase the Tribunal has been conscious of the need to take into account economic developments since the 1994 Review and current economic circumstances, the need for restraint, and community perceptions of what is an appropriate and acceptable adjustment. Since the 1994 Review, significant economic developments noted by the Tribunal include the further opening up of the Australian economy to international markets and the opportunities and risks associated with international competition. There is also a growing recognition (including in economic circles) of the importance of an independent, high quality judicial system. Other developments have been the further decentralisation of the labour market with increasing focus on agreement making at the workplace level, with a greater diversity of options available and a sense of increasing global uncertainty.

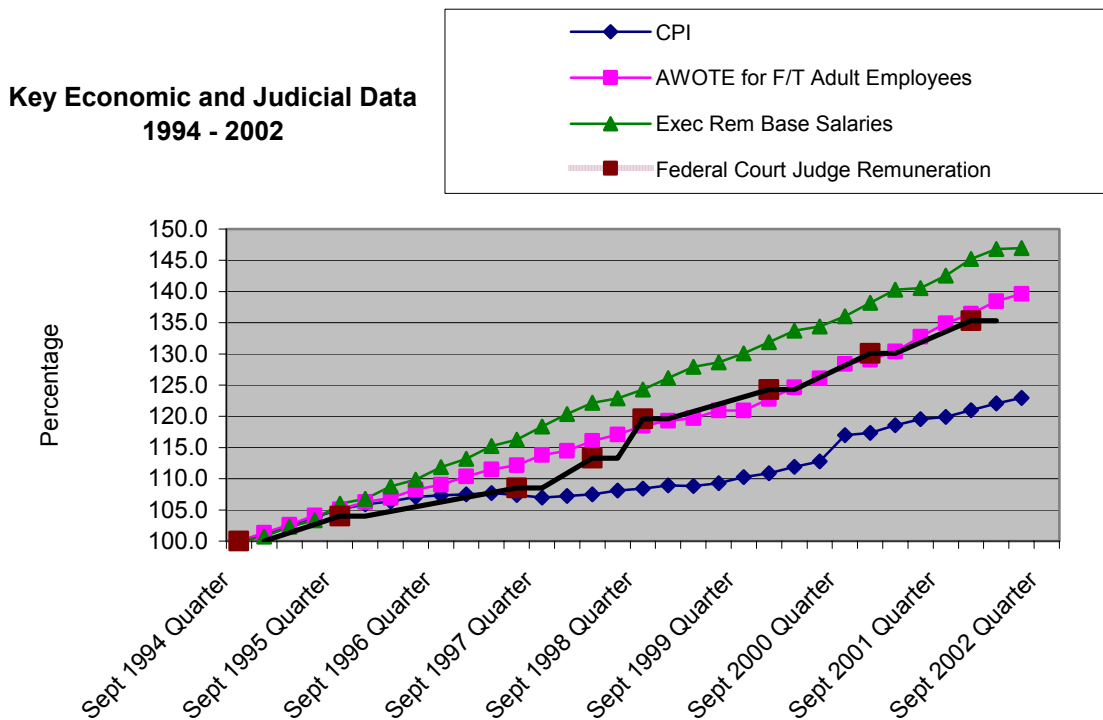
The Tribunal took into account economic data since the last annual review of judicial and related offices' remuneration in October 2001 and also longer term movements, particularly those since the 1994 Review.

4.2.1 Recent economic data

Key economic data since the Tribunal's last annual review in the last 12 months (generally covering the period June 2001 to June 2002) indicated:

- the Consumer Price Index (CPI) increased by 2.8%;
- wages growth as measured by the Wage Cost Index (WCI) increased by 3.1%;
- Average Weekly Earnings (AWE) and Average Weekly Ordinary Time Earnings (AWOTE) increased by 3.9% and 5.2% respectively, for the May 2001 to May 2002 period;
- federal wage agreements for all federal collective agreements certified between 1 July 2001 and 30 June 2002 paid an Average Annualised Wage Increase (AAWI) of 3.7%;
- an average increase in certified agreements in the Australian Public Service of 4.1%; and
- Executive Remuneration in terms of base salary for senior management increased by 4.5%.

4.2.2 Long-term economic data



Key economic indicators, as outlined in the above chart for selected wage and price indices, since the 1994 Review indicate that to June 2002:

- CPI increased by 23%;
- AWE increased by 38.5%;
- the percentage increase in Australian Public Service salaries since around mid-1994 was approximately 27%; and
- Executive Remuneration in terms of base salary for senior management increased by 46.9%.

Since the 1994 Review, the Tribunal has awarded six increases to judicial and related offices with an overall increase of around 27%, up to 1 October 2001. Over approximately the same period, the Tribunal awarded median pay increases of around 33% to full-time public office holders in its determinative jurisdiction. Senior Executive Service (SES) officers in the Australian Public Service (APS), over a slightly longer period, received increases in their base salary of 42% for SES Band 1 and 2 officers, and an increase of 47% for higher level SES Band 3 officers.

The above data show that since the 1994 Review of judicial salaries, judges' remuneration is behind movements in the wider community. The level is approximately 11.5% behind overall movements in AWE and approximately 20% behind increases in Executive Remuneration and SES officers in the APS, and approximately 4% above inflation.

4.3 Relativities within the Federal Jurisdiction

Some written submissions raised the issue of current relativities of offices within the federal jurisdiction. The submissions either sought to maintain existing linkage or nexus arrangements or proposed a move 'up' the existing hierarchy on work value grounds. A range of disparate views emerged during the Review. The Tribunal sought an independent assessment in order to be better informed about the nature of the work performed. The Tribunal considered it important that an independent review be undertaken to provide an as objective as possible basis for assessing relativities, rather than relying only on the relationships between offices that had been established historically. The Tribunal saw such a process as providing a foundation for future reviews.

4.3.1 The Hay Group

The Tribunal engaged the Hay Group, executive remuneration consultants, to consider relativities issues within the federal jurisdiction on the basis of work value through a comparative job value assessment process. The Hay Group conducted an information session for representatives of the courts and tribunals on 24 June 2002. The courts expressed a significant degree of concern about the conduct of the Hay exercise and the capacity of remuneration consultants to understand and examine judicial functions. In light of these strong concerns and recognising a need to maintain positive relationships and continue the cooperation necessary for a Review process, the Tribunal decided to exclude all judicial offices of the High Court, Federal Court and Family Court from the Hay Group exercise.

The external analysis undertaken for the remaining offices provided the Tribunal with information that was of assistance in assessing various relativities claims (see below). The analysis found that the relevant offices covered by the Hay review were generally above the relevant market for lower levels, with remuneration outcomes less competitive for middle and higher level offices. The Tribunal was advised that such an outcome is not uncommon for the public sector environment.

The Tribunal received a number of claims for increases in remuneration based primarily on work value grounds. Taking into account submissions, discussions and information gathered from the Hay Group work value assessment, the Tribunal has decided to adjust the relativities for two offices, namely the Deputy President of the Australian Law Reform Commission (ALRC) and the Chief Executive Officer of the Family Court of Australia.

4.3.2 Offices in the Australian Law Reform Commission (ALRC)

The Tribunal noted that within the ALRC, there was currently a narrow salary difference between the Deputy President (\$136,600) and Member (Full-time) (\$126,100) and also a significant remuneration gap of nearly \$85,000 between the Deputy President and President (\$221,500). While the ALRC's proposed alignment of remuneration with that of the Deputy President of the AAT was not supported, the Tribunal considers that alignment with a Senior Member of the AAT (\$159,600) is appropriate.

4.3.3 Chief Executive Officer of the Family Court

The Tribunal has decided to bring the base salary of the Chief Executive Officer (CEO) of the Family Court of Australia, (currently \$148,600) into line with that of the Chief Executive and Principal Registrar of the High Court (\$166,600) and the Registrar of the Federal Court (\$166,600). A joint submission by the current holders of these three offices' sought this adjustment. The Commonwealth's submission argued that the remuneration of the chief executives of the courts should be based on the actual content and complexity of the particular position rather than being linked to the hierarchy of the court. Associated with the above process, the Tribunal has decided to remove the current provision for an annual performance bonus for the CEO of the Family Court, with performance pay being substantially incorporated into their base rate of pay. The issue of performance pay for the CEO of the Family Court is addressed below.

4.3.4 Chief Executive Officers of the Courts – Performance Pay

In their joint submission, the Chief Executive and Principal Registrar of the High Court, the Registrar of the Federal Court and the CEO of the Family Court opposed performance pay for these offices arguing that it leads to unfairness, divisiveness and dissatisfaction. The CEO of the Family Court was prior to finalisation of the Review, the only one of the three offices with availability to access a maximum of 15% of base salary as performance pay. The Tribunal does not accept the office holders' suggestion that their total remuneration should be increased by 7% in recognition that they will not be eligible for performance bonuses. Such an additional payment would not be appropriate as for two of the three offices there is currently no performance pay available.

4.3.5 Federal and Family Court Judges' remuneration nexus

The judges of the Federal Court and Family Court are remunerated currently at the same level. The Tribunal has some unresolved questions about the current nexus that it was unable to progress at this stage. Without wishing to prejudice future deliberations of the Tribunal, it considers this issue may be better explored at a later date.

4.3.6 Judicial Registrars of the Family Court

The Tribunal received detailed submissions from the judicial registrars of the Family Court, seeking re-alignment of judicial registrars' base salary to 85% (currently set at approximately 76%) of a judge of the Family Court, as originally set in 1988. The judicial registrars submitted that there had been no material change in relation to the office of a judge of the Family Court or judicial registrar to justify altering their relative position. Their submissions noted that judicial registrars perform similar types of work to judges of the Family Court, and that their

remuneration has diminished when compared to that of the judiciary, the market from which they are attracted, the representations made to them prior to appointment regarding nexus with Masters of State Supreme Courts and the complex and demanding work they perform.

However, the Commonwealth submitted that judicial registrars' salary was still too high and that their salary should be below a federal magistrates; while recognising that since 1999 judicial registrars' salaries have not increased at the same rate as salaries for other judicial and related offices. The Commonwealth argued that, unlike a federal magistrate, a judicial registrar is not a justice for the purposes of the Constitution, and that in performing their delegated judicial functions they are required, constitutionally, to be subject to the full supervisory authority of judges. The Commonwealth submitted:

'Any decision made by a judicial registrar can be made afresh by a judge on review. Federal magistrates make final decisions in their own right; their decisions can only be challenged on appeal to the relevant court (the Family Court or the Federal Court), as can decisions made at first instance by judges of those Courts.' (page 8, Commonwealth submission).

The supplementary submissions of the FMS argued that the remuneration of judicial registrars of the Family Court was inappropriately higher than that of a federal magistrate, with the legislative power and jurisdiction of judicial registrars being less than that of federal magistrates. If the remuneration of judicial registrars is set at 85% of a Family Court judge, as submitted by the Family Court, then the FMS argues that the nexus for federal magistrates to that of superior court judges should be set higher.

In considering all these arguments, the Tribunal considers on balance that no reduction in relativities of judicial registrars' should occur as proposed by the Commonwealth and that judicial registrars' relativities should be unchanged.

4.3.7 Relativities between Federal, State and Territory jurisdictions

Little comment has been made by federal courts and tribunals about the current relativities between the federal, state and territory jurisdictions. However, the Tribunal has received submissions for significant changes in some of the remuneration levels in the federal arena. Currently there is a link in place between the federal, state and territory jurisdictions. Change in the federal determination of levels of remuneration may therefore impact on existing state and territory arrangements, altering existing relativities. While the Tribunal is mindful of the implications of making changes to the remuneration of offices in a federal court or tribunal, its responsibility is to form a view on appropriate remuneration levels. Historical relativities are only one element in the remuneration context.

The FMS indicated dissatisfaction with current federal, state and territory relativities. The FMS is presently aligned with state and territory Magistrates Courts, reflecting the Commonwealth's policy approach. The FMS submitted that alignment with state and territory District or County Courts would be a more appropriate benchmark. The Tribunal recognises the FMS's significant contribution since its commencement in 2000, but considers that it is premature to amend existing relativities.

4.4 Recognising performance

Constitutional provisions and the need to preserve clearly the independence of judicial and quasi-judicial offices prevent a move to performance assessment and performance pay for those offices. The Tribunal does not consider that either individual or organisational performance tied strictly to identifiable outcomes is appropriate to consider as an element of remuneration for judicial or quasi-judicial offices. No party seriously proposed performance recognition via remuneration for these offices.

However, the Tribunal considers that the overall achievements of federal courts and tribunals and their development of more efficient systems can be considered in a remuneration context. The material received by the Tribunal has highlighted the innovative use of technology in managing cases and hearing processes. The Tribunal considers that such efforts need to be acknowledged by the community. While not placing a specific quantum on these improvements, the Tribunal has taken this element into account in its deliberations.

For non-tenured quasi-judicial offices, the Tribunal received submissions that performance issues in relation to AAT members did not involve the same considerations that applied to judicial offices. That was because recent appointees were term-only appointees, eligible for reappointment at the expiration of a term. While not supporting performance pay in the case of non-judicial appointees, the AAT supported an individual performance assessment system linked to professional development which may be drawn upon to provide advice to the Commonwealth Attorney-General in the re-appointment process. In the Tribunal's view, such an approach contains merit; however, its implementation falls outside the Tribunal's powers.

4.5 Flexibility of remuneration

Where appropriate, the Tribunal's preference is to move statutory offices to Total Remuneration (TR). TR identifies a total cost of employment figure, rather than the base cash salary alone. TR includes base salary, employer superannuation contributions, motor vehicle (including running expenses), spouse accompanied travel and other benefits related to a particular office. The TR approach provides greater transparency of remuneration and allows greater flexibility for an office holder to tailor remuneration components to suit individual circumstances. The Tribunal's Principal Executive Office (PEO) structure is based on a TR model.

There was a mixed response from the members of courts and tribunals to the possibility of applying TR to their circumstances. The superior courts questioned whether such an approach would be permissible under the Constitution, given the requirement for judicial remuneration to be fixed and not to be diminished. TR for judges also presents difficulties for the Tribunal as some of the judges' entitlements are provided under legislation administered by the Commonwealth Attorney-General (for example, judges' pension and long-leave). Complications also arise with the nature of the Commonwealth judges' pension scheme. The application of the superannuation surcharge on the judges' pension has been challenged in the High Court. At the time of writing, that decision had not yet been handed down.

In light of the above, the Tribunal considers that a move to TR arrangements is not appropriate for judicial offices because of the Constitutional constraints, and the Commonwealth Attorney-General's responsibility for key elements of the terms and conditions of the judiciary.

For the federal magistrates and the non-judicial offices in the Determination who are not subject to these limitations, the Tribunal supports movement to a TR model. Before that approach could be implemented, the Tribunal would wish to consult with relevant parties and to establish that all legal obligations (including Constitutional requirements that the remuneration of a federal magistrate is not diminished during their continuance in office) are met fully.

5. APPROACH TAKEN BY THE TRIBUNAL

5.1 General approach

The Tribunal continues to recognise the principle of judicial independence and its importance to the Australian community. For courts and tribunals to be able to resolve disputes impartially and to make decisions that are able to be accepted by all parties, they must be independent and free from real or perceived external pressure or influence. Adequate levels of remuneration are recognised as a basic underpinning of that necessary independence.

In seeking to set an appropriate level of remuneration, the Tribunal is also mindful of giving due recognition to the importance of the judicial system to the whole of Australian society. The rule of law, its fair application involving the recognition of the rights of all interested parties being presented and protected and its impact on individual parties, broader society, government and the political environment are fundamental elements of Australian democracy. The social and economic benefit of a fair, effective and independent judicial system is beyond doubt.

In making its Determination at the conclusion of the current review, the Tribunal has sought to obtain as full an understanding as possible of the current realities in judicial and related areas. It has noted the changed circumstances and increased pressures in which judicial and related offices are operating.

While there is considerable discretion available to the Tribunal in the way it undertakes a review process, the Tribunal has sought to conduct its Review in as open and transparent a way as possible, while seeking to ensure the Review is undertaken in a timely, considered and cost effective manner. The RT Act gives the Tribunal its powers and defines its scope of operation. Determinations of the Tribunal are subject to disallowance by either House of the Parliament.

The Tribunal is aware that in 1988 the Government did not accept the recommendations made by the then Tribunal (which had a statutory obligation to report to the Minister) for a substantial remuneration increase for members of the judiciary. The Government then asked the Tribunal to provide further advice on appropriate remuneration for the judiciary in the context of centralised wage fixation. The following year the Government passed the *Judicial and Statutory Officers Remuneration Legislation Amendment Act 1989* empowering the Tribunal to make determinations in relation to the remuneration of judges, previously the Tribunal was only able to make recommendations in respect of judges' remuneration. The effect of this legislation is that judicial determinations of the Tribunal are now subject to disallowance by either House of the Parliament.

The Tribunal has sought to balance the sometimes competing interests of judicial and related office holders, the government, the general community and other interested parties such as relevant state and territory remuneration tribunals and various Bar Associations. A considerable divergence of views has been presented to the Tribunal in the course of the Review.

The Tribunal has given careful consideration to what it sees as the key elements in determining judicial remuneration. These include relevant economic indicators and remuneration developments in the business and the broader communities, changes in the nature of and the increasing complexity and productivity enhancements in judicial work, and Constitutional constraints. In reaching its decisions, the Tribunal has sought to ensure that remuneration outcomes for judicial and related offices are pitched to ensure that the national interest in a sound legal system is upheld. The benefits which a vibrant, independent and well qualified judicial system bring to the nation are immeasurable.

5.2 General observations of the Tribunal

A broad range of material, issues and concerns were presented to the Tribunal during the Review. The Tribunal considers that there is an insufficient understanding in the community of the true nature of the Australian judicial system and of the time spent by dedicated office holders who work within it. The work and key initiatives in the courts and tribunals are outlined at **Appendix 2**.

The Tribunal considers that the roles and work methods of courts and tribunals have changed significantly as they have grappled with and responded to developments in society. However, it appears that knowledge of the growth in complexity or the stresses associated with the work that all superior courts are now encountering is not apparent in the wider community. The FMS has contributed to the provision of a simpler and speedier delivery of justice to Australians, backing up the work principally of the Family Court by allowing it to deal with more complex cases. The Federal Court and NNTT have made pioneering efforts in handling native title law. The courts and tribunals have exploited effectively the developments in information and communications technology to facilitate effective case management and hearings.

The Tribunal considers that current levels of remuneration need adjustment to reflect the increased quantum and complexity of work in the judicial environment.

5.3 Remuneration claims

The Tribunal received a range of competing claims about what was considered to be an appropriate adjustment to remuneration, arising from the Review. The Commonwealth argued against any increase. The Family Court, Federal Court, and the New South Wales and Victorian Bar Associations proposed increases in salary ranging from 17% to 80%. The remaining submissions did not address specifically the issue of quantum.

5.3.1 Commonwealth Government's views

The Commonwealth submitted that existing salaries for the federal judiciary were adequate and the current relativities appropriate. It recognised that the adequacy of judicial remuneration plays an important role in underpinning the independence of the judiciary and in attracting able candidates to it. It also supported the continued maintenance of relativities between salaries for holders of comparable federal, state and territory judicial offices. In seeing a strong argument for comparable rates being maintained, the Commonwealth was concerned that a salaries breakout would be likely if the Tribunal determined an increase, submitting:

'Once judges in one jurisdiction had received a salary increase, the new level would be seen as a benchmark for judges in other jurisdictions. The Government would not

support a significant increase in federal judicial salaries as this would destroy existing relativities with the remuneration payable to judges of State and Territory Supreme Courts.’ (page 8)

The Commonwealth’s submission also argued that remuneration should be linked to higher productivity and performance (ie those principles applied in general wage fixing for the community). It noted that while it may be difficult to measure judicial performance with precision, the wage fixing principles that apply to the wider community should apply to the judiciary. However, it also submitted that care needs to be taken to avoid any link between remuneration and productivity gains, as that would be seen as an intrusion upon the independence of the judiciary. Finally, the Commonwealth argued that the level of remuneration has not affected recruitment and that retention is not a concern at this stage.

5.3.2 Views of the Judiciary

The Federal Court of Australia sought a 30% increase to remuneration, basing this claim on achieving recognition and acknowledgement of the nature of their work, the time it takes for judges to discharge their duties properly and to take into account the income level achieved by senior barristers regarded as suitable for appointment to the Federal Court. The Federal Court’s submission stated current judicial remuneration is too low and that consequently, the recruitment and retention of judges was being threatened. It observed that the superannuation surcharge was creating difficulties in retaining judges.

The Family Court considered that current judicial remuneration was insufficient and had an adverse impact on recruitment. It submitted that the Tribunal has departed from obligations the Constitution imposed upon the Tribunal, as over the years it had allowed a diminution of judicial remuneration through inflation, legislative and political interference (for example, the application of the superannuation surcharge to judicial incomes). The Family Court also argued that in the past the Tribunal has not had due regard to appropriate wage fixing principles, in particular those applying for paid rates awards, in determining judicial remuneration. A paid rate approach would, in the Family Court’s view, require identification of an appropriate ‘market’. The court saw the relevant market as being the senior Bar, and argued that was the correct benchmark that should be used by the Tribunal for determining remuneration for judges.

The Family Court outlined four options, using the current remuneration of a superior court judge (\$221,500) as the relevant demonstrator. The first option proposed the rectification of diminution of judicial salaries through inflation, with an adjustment which restored the remuneration of a Justice of the High Court of Australia to the level that maintained its real value during the history of that office since 1903. That approach would result in a salary level of not less than \$305,000 for a Justice of the High Court and consequently a salary of \$259,250 for a judge of the Federal or Family Court.

Option two involved a job work value proposal, based on findings made by Mr John Egan of Egan Associates through a job value assessment he undertook for the Family Court judges. Mr Egan assessed a TR package of \$460,000 for a federal judge, using a base salary of \$291,365, representing a 32% increase. Mr Egan stated this was approximately 75% of the average level of reward, \$623,000 for a senior member of the Bar based on the average net earnings of 158 respondents to a survey of 493 Queens Counsel and Senior Counsel in each state and territory, conducted by Egan Associates in February 2002.

The third option sought rectification of the argued diminution of remuneration caused by political interference, and suggested levels that reflected the outcome of the Tribunal's 1988 Review that had not been accepted by the Commonwealth at that time. This option resulted in a base salary of \$314,083 for a judge of the federal judiciary, representing a 42% increase on current remuneration.

The final option involved application of the paid rates principle referred to above. The Family Court submissions argued that the Tribunal should adopt a particular survey approach, with judicial salaries being aligned with the average income level of a member of the Senior Bar (submitted as being \$623,000). That would place a judge of the federal judiciary on a base salary of \$398,814, an approximate 80% increase on current salary. The Family Court submitted that the proposed salary acknowledged that acceptance of an appointment as a judge usually meant a reduction in the level of prior earnings. It considered that the proposed base salary figure was conservative, given the need to attract skilled members of the senior Bar, and that no recompense was being sought for past suppression of remuneration due to inappropriate political intervention.

5.3.3 Views of the NSW Bar Association and the Victorian Bar Association

The NSW Bar Association submitted that judicial remuneration should be based on the principle of work value, acknowledging the value that the judiciary provide the community and the character, training and general qualifications of appointees. The Association submitted that the current remuneration provided to judges was well below an appropriate level and an increase in the order of a least 50% was warranted. The Association rejected views that judicial remuneration be set at a minimum level:

'There is an unfortunate propensity by some to consider that judicial remuneration should be set based on the minimum sum that will be accepted by those who are prepared to take up the position. Ultimately there will always be senior practitioners of law who will accept appointments to the bench out of duty to the community, regardless of whether the remuneration is set at an appropriate level. The Remuneration Tribunal needs to be wary of relying on the fact that excellent lawyers continue to agree to accept judiciary appointments to base a conclusion that remuneration levels for the judiciary are appropriate. Judicial remuneration should be based on what is fair value for the work, not the minimum that will be accepted.'

The Victorian Bar Association supported restoring parity of income between judges and other professionals. While not making any specific submissions about the appropriate level of an adjustment, the Victorian Bar Association considered that a substantial 'catch up' increase must be made. It submitted that the suggested figures of the Family Court (80.05%) and NSW Bar (50%) should be considered as falling within the appropriate range.

5.4 Consideration of important factors

While a diverse range of issues and concerns was presented to the Tribunal, certain factors emerged as contributing significantly to the Tribunal forming its views. These factors are discussed below.

5.4.1 Performance and productivity

The Tribunal was presented with material about the growing work demands placed on the judiciary and related offices both in volume and complexity. The broader community has also been faced with the demands of an increasingly competitive economy. However, the Tribunal's view is that the judiciary has made a significant contribution to the Australian economy, and has also taken steps to ensure that their work is informed about developments in the economy and society. The changing nature of judicial work, and the development of judicial training and continuing education programs have been taken into account by the Tribunal. The courts and tribunals identified the increasing frequency with which unrepresented litigants come before them, both at trial and appellate levels, and the additional burdens placed on judicial and related offices in ensuring that the needs of all parties are met in a fair and balanced manner. The Tribunal also commends the public educative initiatives of the courts, particularly the work of the Federal Court in its schools program.

Productivity and efficiency improvements through new case management systems, the application of information and communications technology, the innovative work practices and conduct of native title matters, and the changes brought about to assist in the resolution of complex family law issues associated with family law were also important considerations for the Tribunal.

5.4.2 Public perception

The Tribunal considers that judicial remuneration should be set at a level that reflects appropriately the high level of standing of judges, the courts and tribunals, and their importance to the community. Judicial remuneration levels should be set at levels that ensure that the independence, respect and authority of the judiciary are not threatened. In considering remuneration, the non-monetary component of judicial remuneration has also been taken into account, including long-leave, the use of a vehicle for private purposes and the non-contributory pension arrangements.

5.4.3 Recruitment and retention

Recruitment and retention continues to be a vexed question in setting judicial remuneration. The Commonwealth should not be expected to compete with the highest levels of remuneration of a particular private market place. Conversely, remuneration should not be set at such a level as to discourage suitable people from accepting judicial appointment. While it is preferable that only the most suitable candidates be appointed, for various personal reasons and preferences, remuneration alone will not be sufficient to persuade an individual to take a judicial appointment. The Tribunal supports efforts to attract younger recruits so that the composition of the judiciary reflects, as far as possible, Australia's broader social mix and to provide a continuity of experience and expertise within the courts and tribunals.

5.4.4 Relevant market

The Tribunal's view is that the relevant market for remuneration comparison is not limited to the senior Bar or any other specific market. There is a clear distinction between the market in which the judiciary operates (the courts) and the market from which a majority of appointees is drawn (the senior Bar). As a major source of recruitment to the Bench, the remuneration levels of the

senior Bar formed part of the Tribunal's considerations. However, it is the Tribunal's view that the relevant market is that in which the relevant persons function and not the market or markets in which they may have worked previously.

Other significant elements weighed by the Tribunal include a move from the private to public sector (involving a recognition of the concept of public service), tenure (noting also that it is no longer necessary for an appointee to compete in the marketplace for work), status and recognition, and the availability of valuable employment conditions, especially the non-contributory pension. The historical recruitment area for the judiciary, operating in a completely different market and environment, should not be the sole group against which the adequacy of judicial remuneration is assessed. The Tribunal was not presented with any evidence of any other markets, particularly involving professionals, which used the salaries of a recruitment pool as the basis for establishing salaries in the area to which a person was recruited.

The Tribunal notes that judges of federal courts occupy high office in one of the three branches of our system of government under the Constitution. Members of Parliament hold office in the Legislative branch, ministers, senior public servants and others hold offices in the Executive, while judges of federal courts occupy judicial offices. The Tribunal considers that the relevant market for remuneration of the judiciary should also include high level public offices in those other branches of Government. The Tribunal notes that lawyers are currently, and historically have been, a significant presence in the Legislature and the Executive as well as the Judiciary. The Tribunal considers that the 'market' represented by the other branches of Government should be considered along with that of the Judiciary.

5.4.5 Commonwealth, State and Territory nexus issues

The Tribunal wishes to retain the position of High Court judges as the peak of the judicial structure. That position will continue to be reflected in their salary. The current differentials between judicial offices are considered appropriate. For non-judicial offices, the Tribunal has determined that relativity increases should be made to the Chief Executive Officer of the Family Court and the Deputy President of the ALRC.

There is an informal agreement between federal and state Attorneys-General that the rate of base salary for State Supreme Court judges will be fixed up to a maximum of 85% of that paid to High Court judges. State and territory remuneration tribunal representatives indicated in discussions with the Tribunal in July 2002 that there was general acceptance on maintaining a coordinated approach.

The Tribunal supports the continued maintenance of relativities between salaries for the holders of comparable federal, state and territory judicial offices. The Tribunal takes seriously the potential for any 'salaries breakout' between the various jurisdictions, and wants to protect against the damage from differential outcomes such as has occurred in the past. In providing an appropriate increase in federal judicial salaries, the Tribunal has sought to ensure existing relativities with the remuneration payable to judges of state and territory Supreme Courts receives continuing support.

6. THE TRIBUNAL'S CONSIDERATION

The Tribunal, in making its decisions, has had before it a comprehensive range of material, including written submissions, discussions with key parties, advice on work value relativities, economic and remuneration data and legal advice.

6.1 Proposed remuneration adjustment

6.1.1 Major review of judicial remuneration

The Tribunal considers that there is justification for an increase to judicial remuneration. In principle the Tribunal supports the restoration of the remuneration of a Justice of the High Court of Australia to a level that maintains its real value from its establishment in 1901.

Arising from the Review, following its consideration of all the material placed before it, the Tribunal has determined that there should be the following three increases in judicial remuneration. The first increase arising from the Review will be 7% for judicial office holders and is to take effect from 1 July 2002. The second and third increases for judicial office holders arising from the Review are to be implemented in two instalments of 5% from July 2003 and 5% from July 2004. These latter two increases in 2003 and 2004 are independent of the Tribunal's annual review of judicial remuneration, required under sub-sections 7(3) and 7(4) of the RT Act, which are based on relevant economic indices.

The timing of the above increases takes into account the delay in the receipt of some key submissions, in particular the Commonwealth's submission of April 2002, which meant that the Review could not be finalised by the originally planned date of March 2002. The Tribunal has also decided to align future remuneration reviews with the financial year and reporting cycle, with the future annual reviews of judicial remuneration to apply from 1 July.

6.1.2 Major review of related offices' remuneration

For related offices, that is non-judicial offices such as registrars, Chief Executives of the courts, and offices of tribunals, the Tribunal supports the Commonwealth's view that these offices' remuneration rates should not be automatically linked to judges' remuneration. The Tribunal considers that the nature of judicial responsibilities and the Constitutional provisions governing the remuneration of judges creates a distinction between the two categories of offices provided for in the current Determination. It is not necessary or appropriate to continue any direct linkage between judicial and non-judicial offices in relation to remuneration outcomes. In adopting this approach, the Tribunal considers that based on the information before it, related offices are remunerated appropriately.

The Tribunal decided to alter the structure of its Determination to distinguish between judicial and non-judicial offices. The Tribunal does not intend to act at this time upon the Commonwealth's suggestion that related offices currently covered by the judicial and related offices' determination would be better covered by the full-time statutory office-holders' determination.

For related offices, the Tribunal has determined an increase of 3.1% based on wages growth as measured by the Wage Cost Index (WCI). This increase is to take effect from 1 July 2002, consistent with the implementation of increases for judicial offices. The Tribunal will consider

future increases for related offices as part of its next annual review as required under subsections 7(3) and 7(4) of the RT Act, which are based on relevant economic indices.

The Tribunal has also decided to align future remuneration reviews with the financial year and reporting cycle, with the future annual reviews of related offices remuneration to apply from 1 July, while they continue to be covered by the judicial and related offices' determination.

6.2 Tribunal's consideration of specific issues

The Tribunal was presented with a range of issues and concerns from submitting parties during the course of the Review. The Tribunal's consideration of these issues is outlined below. Where a particular issue relates to a specific court or tribunal, that body is identified.

A number of other issues were raised by parties during the Review, both in written submissions and orally. These issues were the option for federal magistrates to buy-back up to 12 weeks of long leave after five years, reduced hours for senior judges, changes to established relativities in addition to those outlined below, and a range of other concerns and suggested initiatives. In undertaking the Review the Tribunal has considered these issues and has determined that there should be no change in relation to current arrangements applicable to these matters.

6.3 Travel

6.3.1 Travel Tier

The Tribunal received a submission from the CEO of the FMS, that the CEO's travel entitlement for the office should be set at the higher Tier 1 level. The basis for the submission was that the current arrangement meant that the CEO is unable to travel on business with the Chief Federal Magistrate, and that the amendment would bring the travel entitlements for the CEO of the FMS into alignment with the arrangements for the chief executives of the other federal courts. While clause C9 of Determination 2001/23 provides for class of travel upgrades in order to accompany a person travelling at a higher class of travel in the interest of the Commonwealth, in light of the FMS's submissions and particular circumstances of this case, the Tribunal has decided to provide Tier 1 travel entitlements for the CEO of the FMS.

6.3.2 Rate of travel allowance

The NNTT made a submission drawing attention to anomalies of around \$30.00 per overnight stay between the Registrar's entitlements for several centres and those applicable under the relevant APS determination for SES employees. The submission suggested that these anomalies could be overcome if the Registrar's entitlements for particular centres, where less than those of SES employees, were set at the agency rate for SES employees. As a matter of principle, the Tribunal does not support the establishment of links with groups outside its jurisdiction. The Tribunal considers that this issue should be considered as part of a future general review of travelling allowance. The Tribunal will consider other travel allowance concerns raised by the NNTT in that review.

6.3.3 Spouse accompanied travel

The Tribunal received some submissions supporting the introduction of a provision to allow the cashing out of spouse accompanied travel benefit for non-judicial office holders. The Tribunal

considers that this matter will be best addressed in the context of considering a movement to TR for non-judicial offices.

6.4 Pensions

The key elements of the judges' pension scheme were outlined in the Review's 2001 Discussion Paper. While the *Judges' Pensions Act 1968* (the Pensions Act) falls outside the Tribunal's direct responsibilities, a number of issues regarding the Pensions Act and superannuation matters were raised with the Tribunal.

6.4.1 Value of the Judges' Pension Scheme

A number of the submitting parties noted the significance of the judges' pension scheme and the value it has in contributing to the attraction and retention of judges. There were differing views as to whether or not it should be included in the context of discussions on judicial remuneration. The Tribunal notes that the nominal contribution rates for all Federal Courts, with the exception of the FMS which does not have access to the Scheme, have been valued by the Australian Government Actuary (AGA) at 51.7% of salary component. That figure was calculated in the Report on the long-term costs of the judges' pension scheme prepared by the AGA, at 30 June 1999. Based on this figure, the current notional value of the TR package of a Federal Court judge increases to \$336,016 (exclusive of other benefits), although the actual monetary value will vary according to individual circumstances such as age and length of service. The Tribunal's Discussion Paper foreshadowed an updating of actuarial research on the pension scheme. However, the AGA advised that an update of the 51.7% notional employer contribution rate would not be available within the timeframe of the Review. The next relevant review is not due for completion until 30 June 2003. Any significant outcomes from that AGA review should be taken into account in subsequent determinations.

The Tribunal considers that the judicial pension plays an important role in terms of overall remuneration and its significance should not be dismissed. The Tribunal considers that reference to the salary component alone does not provide an accurate picture of the true level of judicial remuneration.

6.4.2 Superannuation surcharge

Judges commented that the superannuation surcharge is, in addition to the current level of remuneration, a further disincentive to recruitment, and that the surcharge will also have an impact on retention. That is because there is an expectation that judges will retire upon qualifying for the judicial pension in order to limit a surcharge debt, thus leading to a loss of experienced judges. Arguments that judges should be compensated for the effect of the superannuation surcharge on retirement income are rejected by the Tribunal as it is not appropriate that compensation should be provided for general taxation measures applicable to the whole community. There has been a High Court case argued challenging the application of the surcharge to the judiciary. At the time of writing, the High Court had reserved its decision.

6.4.3 Superannuation – Federal Magistrates Service (FMS)

During the course of the Review the Tribunal was advised by the relevant parties that the FMS wrote to the Government in late 2001 requesting an increase to the Commonwealth's contribution for Magistrates' superannuation, and to provide death and disability income

protection. The Tribunal was informed that the FMS's superannuation provisions do not contain benefits available in most public sector superannuation schemes, such as guarantees against negative returns, lower administration fees and charges, and death and disability cover. These issues were referred to the Tribunal by the Commonwealth Attorney-General late in the Review, and are currently under consideration.

6.5 Salary sacrifice

The Tribunal's Discussion Paper indicated that during the course of the Review, the Tribunal would be considering the merits of moving towards a Total Remuneration (TR) approach to the limited extent possible for both judges and related offices. TR includes base salary, employer superannuation contributions, motor vehicle (including running expenses), spouse accompanied travel and other relevant benefits.

There has been a mixed response from courts and tribunals to the concept of applying TR to their remuneration. The superior courts questioned whether such an approach would be permissible under the Constitution, given the requirement for judicial remuneration to be fixed and not to be diminished. Legal advice provided to the Tribunal indicated that there are difficulties in establishing a TR approach for judges due to the complex interaction of two matters. Firstly, section 72(iii) of the Constitution provides that judicial remuneration be fixed and not be diminished during the term of office. Secondly, certain legislation outside the Tribunal's control (for example, the *Judges Pension's Act 1968*) deals with matters that may fall within the concept of 'remuneration' in section 72(iii) of the Constitution and in turn raise concerns regarding the need to ensure that 'remuneration' for constitutional purposes is fixed and not diminished.

However, consistent with its view on the desirability of salary packaging in its determinative jurisdiction, the Tribunal supports its use (for example, motor vehicles, superannuation and other non-cash benefits) for non-judicial office holders who are not subject to the constraints faced by the judiciary. The Tribunal has been advised that the application of salary sacrifice to federal magistrates, given they do not have an entitlement to the judges' pension, requires further consideration in order to ensure Constitutional provisions are complied with, and the offices are not disadvantaged.

6.6 Leave

6.6.1 Federal Magistrates Service (FMS) annual leave flexibility

The FMS sought an additional two weeks' annual leave, that is six weeks' per year, based on the nature of their workload and the lack of flexibility in leave and working arrangements. They noted that other federal judges receive eight weeks' leave in each year, while federal magistrates' current provisions are for four weeks of annual leave. In response to the FMS's submissions, the Tribunal was advised by the Federal Court that there appeared to be a misunderstanding as to the entitlement of judges of the Federal Court to annual leave, advising the Tribunal that they are entitled to only four weeks of annual leave per year. The Tribunal considers that the current annual leave entitlements for the FMS are appropriate.

The FMS also sought additional flexibility for their leave arrangements to assist with balancing work and life needs. The Chief Federal Magistrate raised the issue as a key element in influencing recruitment and retention in the Service. To assist with future recruitment and retention in the FMS, the Tribunal supports the option for federal magistrates, where they freely

choose to do so, being able to cash out annual leave (up to a maximum of two weeks per annum) or to purchase additional annual leave (up to a maximum of four weeks per annum). The Tribunal notes that this proposal is consistent with legal advice. Furthermore, the Commonwealth did not oppose in principle the availability of additional recreation leave to federal magistrates through salary packaging, provided the maximum of additional leave is set at four weeks so that the ability of the FMS to deal with its workload was not adversely affected by magistrates being on leave for extended periods.

6.6.2 National Native Title Tribunal (NNTT) long service leave

The NNTT raised concerns with the current long service leave provisions for members of the NNTT who have not qualified for long service leave at a time when their appointment is not renewed. The Review is focused upon remuneration, but the Tribunal undertook to raise the issue with the Commonwealth Attorney-General.

6.7 Outplacement allowance

The NNTT also raised with the Tribunal the issue of providing assistance to members whose appointment was not renewed, possibly through the provision of an outplacement allowance to assist readjustment following the end of a short term of appointment. The Tribunal sees merit in the proposal, but considers that it is preferable that the relevant parties provide the maximum possible notice to each other, if renewal of appointment will not occur. That will enable both parties a reasonable opportunity to make suitable alternative arrangements.

6.8 Part-time members' sitting fees

The Tribunal received submissions from the NNTT requesting consideration by the Tribunal of the establishment of an additional tier of sitting fee to apply to days that extend up to and beyond a 7.35 hour threshold. The NNTT sought to compensate members, particularly part-time members, in relation to the long hours worked 'on country'. It argued that mediation and negotiation assistance functions often take members into rural and remote locations, with a 12 hour or more working day not being uncommon. The NNTT submitted that under current arrangements, members are compensated at the same rate applicable for the times when they carry out work that attracts the three or five hour rules. It argued that there is an inconsistency in the existing approach which allows an accumulation of four days' sitting fees under the present three hour rule for four separate days of arbitral work totalling 12 hours, compared to a single day's sitting fee for a single day's mediation that had a 12 hour duration.

The current relevant Determination 2001/23 (at clause B8) provides that a part-time office may be paid the proportion of the salary of an equivalent full-time office. The Tribunal obtained advice to assist with the use and operation of the current clause, including the inclusion of a formula to enable the calculation of an hourly rate for part-time offices. The Tribunal notes that the use of this clause could go some way to addressing and recognising the long hours that part-time members work. For example, whereas a part-time member of the NNTT would currently be entitled to \$610 for a 12 hour working day, through utilising the hourly rate provisions of this clause, they would be paid approximately \$830, an additional \$210. To ensure that this provision is used appropriately, the Tribunal has also determined that a cap of 12 hours in any one day should apply. The provision has been amended so that it applies only to non-judicial offices in order to ensure that the constitutional requirement that judicial remuneration shall not be diminished during a judge's continuance in office is met.

6.9 Part-day sitting fees

The Tribunal received submissions from the Administrative Appeals Tribunal (AAT) that raised concerns regarding the disparity between part-time members' sitting fees, in particular the entitlement to 50% of the daily fee for hearings cancelled with less than five working days' notice and 40% of the daily fee for hearings which conclude in less than two hours. The AAT's claim is rejected by the Tribunal as the proposed change would establish arrangements inconsistent with other office holders, and no other submissions were received advocating an increase in the part-day rates. Based on the material presented, the Tribunal does not consider that the daily fee for hearings cancelled with less than five working days' notice should be reduced to align with the daily fee for hearings which conclude in less than two hours.

Appendix 1**Review of Judicial and Related Offices: List of Submissions received**

1. The Hon Daryl Williams AM QC MP, Attorney-General of Australia, on behalf of the Commonwealth Government.
2. The Hon Alan Goldberg, Judge, Federal Court of Australia, on behalf of the judges of the Federal Court of Australia.
3. The Judges and Judicial Registrars of the Family Court of Australia.
4. Joint submission by Mr Christopher Doogan, Chief Executive and Principal Registrar, High Court of Australia; Mr Warwick Soden, Registrar, Federal Court of Australia and Mr Richard Foster, Chief Executive Officer, Family Court of Australia.
5. Ms Diana Bryant, Chief Federal Magistrate, Federal Magistrates Service of Australia.
6. Mr Peter May, Chief Executive Officer, Federal Magistrates Service of Australia.
7. The Hon Justice D F O'Connor, President, Administrative Appeals Tribunal.
8. Mr Graham McDonald, Presidential Member, Administrative Appeals Tribunal, on behalf of all full-time Deputy Presidents and Senior Members of the Federal Administrative Appeals Tribunal.
9. Professor David Weisbrot, President, Australian Law Reform Commission.
10. Mr Christopher Doepel, Registrar, on behalf of the National Native Title Tribunal.
11. Ms Ruth McColl S.C. President, The New South Wales Bar Association.
12. Mr Jack Rush, Acting Chairman, the Victorian Bar.
13. Justice Ken Crispin, Supreme Court Canberra, ACT.
14. Mr J Linden (NSW Magistrate).
15. Mr S P K Brown
16. Mr R J Ellicott QC, Wardell Chambers
17. The Hon David K Malcolm AC CitWA, Chief Justice of Western Australia.

Work and key initiatives in the Courts and Tribunals

Since the 1994 Review, federal courts and tribunals have undergone significant change in their structure and operations. The ALRC's report *Managing Justice* (ALRC 89) recognised the reforms initiated by courts and tribunals stating :

'In recent years, the Federal Court, the Family Court and the AAT all have initiated significant changes to their rules, practices and procedures, case management systems, data collection and information technology systems, education and training programs, and approach to 'customer service' – with, it must be said, varying degrees of success.' (Paragraph 1.171, page 107)

The Tribunal notes that the procedures instituted by the FMS have also demonstrated innovative approaches. Some of the developments are outlined below.

Federal Court of Australia

The Federal Court has original jurisdiction for over 150 Commonwealth Acts. Over 5,385 applications were filed in 2001-02. The Federal Court's submission to the Tribunal noted that judges are regularly required to consider and resolve disputes in many diverse areas of law, including constitutional, administrative, bankruptcy, trade practices and competition, consumer protection, corporations, intellectual property (including patents, trademarks, copyright, registered designs and trade secrets), customs, taxation, industrial and workplace relations, admiralty, repatriation and veterans' entitlements, migration and refugee, human rights, federal criminal, defence services and extradition matters. In addition, matters arising from new and emerging industries have come before the court for resolution.

The submission noted particularly a significant workload arising from judicial review of decisions of the Migration Review and the Refugee Review Tribunals. The number of applications in this area has increased from 418 cases in 1996-97 to 1,121 cases in 2000-01. (Federal Court Annual Report, 2000-01, page 43). The challenges presented and the impact on workload and methods of work arising from the native title jurisdiction were acknowledged by the Commonwealth Attorney-General in his address to the Full Federal Court at its ceremonial sitting on 7 February 2002. The Attorney-General said:

'Another significant impact on the workload of the Court has been in the area of native title. I am conscious that this has been a challenge for the Court. Many native title cases do not fit the traditional mould of court litigation. The number of parties alone increases the complexity of much native title litigation. Slowly but steadily the case law on native title is increasing, as is the number of native title determinations....The Government acknowledges the professional and committed way in which the Court has managed its native title workload.' (Federal Court Primary Submission, page 22)

The broad range of matters handled by the Federal Court means that its decisions have a major impact on commercial, governmental and social activities both for the direct parties involved in a matter and on the broader society. The Tribunal considers this impact and its importance should not go unrecognised. The Tribunal was impressed by the original and proactive initiatives

established in recent years to improve the level and quality of service that the Federal Court provides to the community. Key reforms in recent years include developing and implementing:

- a docket system of case allocation and management;
- an eCourt strategy;
- a protocol for the giving of expert evidence;
- a system of 16 standing committees, involving judges and registry staff, to guide the court's administration;
- a community relations and education program;
- the use of video conference to conduct hearings and appeals with different parties in different places at the one time;
- the provision of facilities in 'on country' native title hearings in remote locations;
- a program for indigenous research associates;
- practice and procedure reforms to the Rules of Court;
- a website and the publication of judgements on the internet within minutes of their publication in court; and
- programs for visiting judges from countries such as Indonesia, the Philippines and Vietnam.

The 'virtual courtroom'

The Tribunal noted particularly the Federal Court's use of new technology. The court's eCourt strategy enables it to provide an enhanced access to justice with a focus on the needs of remote and disadvantaged court users. Key initiatives include an Electronic Filing System, electronic Courtrooms and hearings, electronic trials and video-conferencing, and the provision of information about court procedures via the website, videos of court procedures, and step-by-step guides. The eCourt provides a virtual courtroom for allowing for directions and other orders to be made on-line.

Expert evidence

The Federal Court's presentation of expert evidence has been streamlined through the so called 'Hot Tub' procedure. Briefly, this involves the parties' expert witnesses giving evidence at the same time, with each sides' expert able to question the other directly, without the intervention of counsel. Following completion of this process, counsel may cross-examine and re-examine in the conventional way. Alluding to the benefits, the Federal Court noted a major predatory pricing case (*Australian Competition and Consumer Commission v Boral Ltd* [1999] FCA 1318), in which lay evidence took some four weeks, but the expert evidence of two distinguished economists, fundamental to the whole case, was disposed of in a day. Litigants, practitioners and experts have provided favourable comments.

Education

The Tribunal also noted the Court's education program for school students aged 13-17. That program includes a national art competition, and the provision of curriculum materials explaining the court systems in Australia with a particular emphasis on the Federal Court. The Federal Court's initiatives were recognised by Professor David Weisbrot, President, ALRC who has stated that:

'In summarising our consultations, the Commission reported that there has been consistent praise for the Federal Court as a 'world class civil court'. (Professor David Weisbrot, President, Australian Law Reform Commission, 'Reform of the civil justice system and economic growth: Australian experience' address to the 'Court Reform and Economic Growth', Fundacion ICO Conference, Madrid, 19 October 2000).

Family Court of Australia

The Family Court's jurisdiction is an area of law that impacts most directly on the lives of individuals and also influences Australian society. The Family Court submitted that it has experienced a 55% increase in work loads (represented by applications for interim and final orders not including divorces) from 1990 to 2000. The establishment of the FMS and the referral of some types of family law matters to the FMS has resulted in reductions in Family Court workloads. However, the Family Court further submitted that the overall increase in workload for the Family Court from 1990 to 1 January 2002 was 34%.

The number of judicial officers in the Family Court has remained stable from 1990 to 1 January 2002. Family Court administrative staffing reduced by 29% overall in the same period.

The Chief Justice of the Family Court, in the Forward to the *Future Directions Committee Report, 2000* stated that:

'Family Law is a unique and critically important jurisdiction. It is the jurisdiction that most directly impacts on the fundamental unit of our society - the family, particularly children who are among the most vulnerable in our community. In contrast with most civil litigation, there is often a significant ongoing relationship between the parties to family law proceedings after the litigation has concluded and therefore the potential for further or extended litigation is great. In many cases the parties will be required to deal with each other on a regular basis and to have regular contact through their children. This means that the process and outcome of the litigation must be such as to permit the parties to have a sensible ongoing relationship.'

The stress associated with the family law jurisdiction was noted in ALRC's Managing Justice (ALRC 89) report:

'Further, the family jurisdiction is a stressful one for judges, registrars, counsellors and lawyers. The stresses derive from dealing with emotional, angry and disaffected parties, with the frequent complaints from unsuccessful parties and determining or facilitating outcomes which are not optimal but may be the best in the circumstances. These factors can engender low morale, 'burnout' and defensiveness from within family courts and the profession.' (para 8.24)

The Family Court's submission noted, and the Tribunal recognises, the significant changes in family law arising from legislative amendments and case law since the *Family Law Act 1975* commenced operation. Changes identified include:

- the referral of powers by the states to the Commonwealth in disputes involving ex-nuptial children;
- jurisdiction to deal with non disclosure of assets and treatment of trusts and corporate entities;

- developments in medical technology (particularly in relation to the creation of children and the determination of paternity);
- increased knowledge about the incidence, nature and effects of family violence;
- increased understanding of the significance to children of their indigenous cultural connections; and
- the introduction of a three stage compliance regime in relation to parenting orders.

Family Court submissions noted other influences upon its work. These included a society where people were increasingly mobile within Australia and internationally, leading to complex re-location and international abduction cases; distribution of financial resources, with interaction between family, equity, bankruptcy, revenue and superannuation law; valuation of assets (from household contents through to complex commercial structures); third party interests, superannuation; child support; self represented litigants and child abuse matters.

The Family Court provided the Tribunal with material demonstrating improved efficiency in the handling of matters achieved by the Family Court over the last four years. The initiatives were directed towards planning, process improvement, culture reform, client service, internal support functions, and the use of information technology for case management, knowledge management and research.

The Tribunal is aware of the stress faced by members of the Family Court, and the particular set of skills, experience and competence needed to manage the legal, emotional and social factors involved.

Federal Magistrates Service (FMS)

The FMS was established by the *Federal Magistrates Act 1999*, which commenced on 23 December 1999. The court, an independent federal court under the Constitution commenced operation on 3 July 2000. The establishment of the FMS was a significant change to the federal justice system. The FMS is the first lower level court created by the Commonwealth Parliament. The tenure and remuneration of Magistrates are protected by section 72 of the Constitution. The Service is headed by the Chief Federal Magistrate and 18 federal magistrates have been appointed to date.

The Commonwealth Attorney-General's submission noted:

'The Government's purpose in establishing the FMS was to provide a cheaper, simpler and faster method of dealing with less complex family law matters and civil matters arising under federal laws. The FMS has proved very effective in dealing quickly and cheaply with matters within its present jurisdiction.'

'The jurisdiction of the FMS includes family law and child support, administrative law, bankruptcy, unlawful discrimination, consumer protection law, migration matters and privacy law. As is the case with all courts, additional jurisdiction may in the future be conferred on the FMS (whether in these or other areas).'

The Tribunal was impressed by the way in which the FMS has established its place in the federal judicial system. The table below demonstrates that since it commenced operation the FMS has received an increase in divorce applications, rising from a nil base to 31,837 matters with a finalisation rate of over 80 per cent (26,368 matters) of these matters over the year.

Federal Magistrates Service – Workload

Jurisdiction/Administration	1999/2000	2000/2001	2001/2002
Family Law Matters			
Files opened (Divorce applications filed)*	438 nil	30,670 (26,070)	31,837 (31,756)
Appeals	Nil	24	83
Federal Law Matters			
Applications filed (Bankruptcy law cases filed)*	Nil nil	2,292 (2,097)	3,393 (2,908)
Appeals	Nil	8	66
Number of Federal Magistrates	10	16	19

* Indicates the greatest number of cases in the relevant jurisdiction.

Australian Law Reform Commission (ALRC)

The ALRC is an independent statutory authority, responsible to parliament through the Commonwealth Attorney-General. The primary function of the ALRC, as set out in section 21 of the *Australian Law Reform Commission Act 1996*, is to give policy advice to the Parliament and government on reform of the law pursuant to references to the ALRC made by the Attorney-General.

While accountable to the Parliament for its budget and activities, the ALRC's independence provides it with the ability to make research findings and recommendations without fear or favour. ALRC recommendations are considered by the government and are not always adopted. However, nearly 80 per cent of the ALRC's reports have been either substantially or partially implemented. The ALRC's work covers a wide range of issues. In recent years it has been tasked to work on areas as such as the confiscation of the proceeds of crime; a review of management, practice and procedure in the federal courts and merit review tribunals; a review of the *Marine Insurance Act 1909*; a review of the *Judiciary Act 1903* and related legislation; and the protection of human genetic information.

One example of the ALRC's work is *Managing Justice* (ALRC 89). That report represented the results of a major four year inquiry, arising from terms of reference directing the ALRC to consider 'the need for a simpler, cheaper and more accessible legal system'. The ALRC issued a discussion paper, six issues and background papers, conducted nation-wide consultations and received some 400 written submissions. A series of research reports (representing the largest and most comprehensive empirical study of case files and case cost information from the Federal and Family Courts and the AAT), was also prepared.

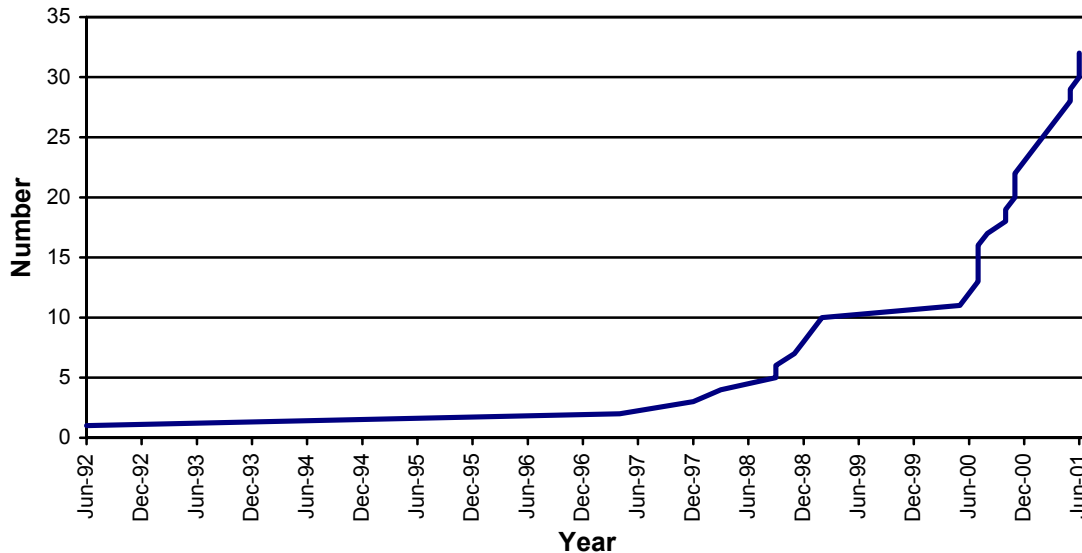
National Native Title Tribunal (NNTT)

The NNTT established under the *Native Title Act 1993* (the NNTT Act) assists in the resolution of native title issues, through agreement-making and also arbitrates in relation to some types of proposed future dealings in land (future acts). The NNTT Act requires the NNTT to carry out its functions in a fair, just, economical, informal and prompt manner.

The NNTT mediates native title claims under the direction of the Federal Court, with hundreds of agreements documented throughout Australia since its establishment in 1994. Growth in the

NNTT's work is outlined in the Table below, extracted from the NNTT's Annual Report 2000-2001 (p7).

NNTT: Growth in number of native title determinations (claimant and non-claimant) including proposed, draft and/or conditional determinations to 30 June 2001



The Tribunal recognises that the operating environment of the NNTT differs from that of courts and other tribunals. The specialised work of NNTT members provides particular challenges. The current position description for a member outlines some of the distinctive features, including:

- the parties are usually from divergent linguistic, cultural and socio-economic backgrounds;
- the number of the parties can be high – party lists of 200 or more are not uncommon;
- most mediation is carried out in regional settings far removed from normal hearing venues and facilities and sometimes in uncomfortable physical circumstances; and
- mediation dynamics are often volatile.

Members working on native title matters need a distinctive mixture of knowledge and skills. Members are drawn from a range of professions including the law, anthropology and land management. The Tribunal is encouraged to see, and is mindful that its determinations continue to support, the relatively youthful composition of members in the tribunal. There is an average age of 51 years for all 14 members, and an average age of 47 for the 7 full time members.

Administrative Appeals Tribunal (AAT)

The AAT, established by the *Administrative Appeals Tribunal Act 1975*, is an independent body that reviews, on the merits, a broad range of administrative decisions made by Commonwealth (and, in limited circumstances, state) Government ministers and officials, authorities and other tribunals. The AAT also reviews administrative decisions made by some non-government bodies. Merit review of an administrative decision involves full reconsideration of the issues. The Tribunal decides whether, on the facts before it, the correct or, in a discretionary area, the preferable decision has been made in accordance with the applicable law. AAT decisions can be appealed to the Federal Court and the FMS in the first instance.

The AAT is given jurisdiction by 375 Acts, covering a diverse range of subject matter including taxation, social security, veterans' affairs, Commonwealth employees' compensation and superannuation, criminal deportation, civil aviation, customs, freedom of information, bankruptcy, student assistance, security assessments undertaken by ASIO, corporations and export market development grants. Along with its growing jurisdiction, the workload of the AAT has increased significantly over the past ten years from a total of 4,794 applications lodged in 1991-92 to 12,835 applications lodged in 2000-01. Finalisation of matters has also increased at a similar pace over the same period. The Tribunal notes that in recent years, whilst the workload of the AAT has increased, the number of members has fallen. There were 100 members at 30 June 1997 and 87 members at 30 September 2001 with fewer Deputy Presidents and Senior Members.

The AAT has introduced, amongst various performance initiatives, the introduction of compulsory conciliation conferences resulting in a noticeable improvement in achieving settlements in compensation cases. In the year to 30 June 1997, 63% of compensation matters were settled without a hearing; that figure rose to 89% in the year to 30 June 2001.

The Tribunal notes that the Commonwealth Government's bill to establish an Administrative Review Tribunal (ART) which would have altered organisational arrangements for review of decisions by Commonwealth administrative law tribunals was not passed by the Parliament on 26 February 2001.