ADMINISTRATIVE REVIEW OF MEDICAL ISSUES: SAY 'OUCH' WHEN IT HURTS

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Introduction

> *In the curial interface between medicine and the law, science is moulded into an uneasy and unnatural use within a system of intellectual combat alien to the scientific method. Enmeshed in this process are expert witnesses.*[1]

The last decade or so has seen significant review of issues relating to the giving of expert testimony before Courts and Tribunals.[1] There has been a great deal of legislative change to accommodate various recommendations and a range of judicial pronouncements on the issue both in and out of Courts. In the meantime, the AAT has been conducting its own experiment, the Concurrent Evidence Trial. There remain hugely divergent views, though, on what, if any are the problems associated with expert evidence and how any perceived problems can best be addressed.

It is my belief that the problems are to some extent magnified in the context of Tribunal proceedings in which the rights, and sometimes, basic needs, of the citizen are subjected to review in a context in which there is very limited challenge if the decision-maker 'gets it wrong' because of what in a court review context might be regarded as 'an unsafe and unsatisfactory' conclusion on the evidence and therefore appellable. This paper aims to highlight some of those problems from the perspective of a regular practitioner in the context of medical evidence before the AAT and to provide some modest suggestions for consideration.

The perceived problems

A quick review of the myriad of speeches and publications available on the subject of expert evidence in recent years highlights some main areas of concern. Views as to which of the factors identified below are not universal; some are merely my own observations, or at least my perspective on them.

Qualifying the witness

I will come back later in this paper to the issue of how the law of evidence is or ought to be regarded in dealing with medical issues before the AAT. In the meantime, I will assume that at least the spirit of the *Evidence Act 1995* (Cth)(EA) has relevance to the matters being canvassed herein[2]. On that assumption, I note the following provisions of the EA:

> Section 76(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

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However,

> Section 79 If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

One of the difficulties that arises in this respect now is identifying just what area of expertise is relevant to a particular issue. This can be made difficult by the subject matter, for example in determining issues relating to birth trauma, is it a neonatologist, a pediatric neurologist, a pediatric neuroradiologist or whatever, that might be required? Generally speaking, most medical issues before the AAT are not so difficult but it is not uncommon to have three or four 'specialists' called upon from different fields, some recognised as specialists through the Medical College regime, some self-proclaimed specialists. As to the latter, one only has to reflect upon RSI and CFS 'specialists' of the 1980's and 1990's respectively. However, challenging specialisation can be time-consuming, may be seen as time-wasting by others present and may require a level of expertise that the challenger lacks.

Generally speaking, it is recognised that as well as identifying the training or experiential basis, in qualifying the expert it is necessary to ensure that the opinion expressed arises from that identified expertise. *HG v R*[1] and *Makita (Australia) Pty Ltd v Sprowles*[2]. Sadly, as was identified in *HG,* it is not uncommon to find, on scratching, that 'on the contrary, a reading of his report, and his evidence at the committal, reveals that it was based on a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise (of a psychologist)'.

Separating the wheat from the chaff in this respect falls to the competent advocate. Whilst some errors may be obvious on the face of the report (as appeared to be the case in *HG*, in many instances, the report will be worded sufficiently obscurely or technically, or its author will be attended by such apparent eminence, that the flaws are less than apparent. Even an inquisitorial Tribunal is unlikely to delve into evidence so deeply of its own initiative as to dislodge many flaws.

There may be disagreement though as to how specific that expertise needs be to fall within the definition. Having accepted that 'functional overlay' consequent upon but having superseded a physical illness was in fact an injury, Einfeld J in *Hairis v Commission for the Safety and Rehabilitation of Commonwealth Employees*[3] went on to say (having indicated that if expertise were to be challenged the time to do so had passed):

> 18. In any event, there is no rule of law that the evidence of an experienced orthopaedic or general surgeon about functional overlays must be rejected by a tribunal of fact in favour of the evidence of a psychiatrist on the same subject. That is a matter for the tribunal of fact to weigh up for itself, taking into account the condition in question, the experience of the respective practitioners, their application to the task in hand, how much time they have spent with the patient to assess the condition, the tribunal's own assessment of the injured worker and the doctors in the witness box, the content of the cross examination, and many other factors. It is a matter of weight if the tribunal of fact, upon undertaking that task, prefers the evidence of one expert with considerable experience in the field to a psychiatrist, however talented. A question of law will rarely arise to set aside an assessment of evidence in such circumstances.

It is the very fact that challenges as to the weight attached by Tribunals to particular pieces of evidence through either the 'error of law' appeal within various enabling statutes or on ADJR appeal that such potential errors must be identified and addressed firmly at hearing level.

Perceptions of bias

In the Australian discussion of bias and expert evidence, the predominant concern appears to be bias resulting from the receipt of payment. It was certainly a concern underlying both the Woolf and Ipp recommendations geared towards single expert evidence. It must be recognised by anyone who has participated in litigation whether strictly so in Courts or less formally in the administrative arena, that advisors gravitate to those experts whose opinions generally conform to their perspective on issues, and that such experts, even those seeking to genuinely express an *honestly held opinion*, nevertheless do so with an understanding, subliminal or otherwise, that they are defending a position. If nothing else, they do not wish to look silly in altering the views expressed in their written reports (which are now invariably before at least the other party before the evidence is given). Add to that that willing experts are called upon more frequently, and then often find themselves in the same 'battle lines', often against repeat 'foes', it must be recognisable that bias, in the sense of an inclination to express a certain type of opinion, will emerge.

Justice Downes[4] has expressed the opinion that 'with very few exceptions, they (expert witnesses) do not deliberately mould their evidence to suit the case of the party retaining them. When they do, it is obvious.' He said this in the context of expressing support for 'the great values of the traditional approach to expert evidence', a somewhat rare vote in favour of the adversarial approach to eliciting evidence in the AAT from its head honcho! With respect, I agree with his view with the exception that the 'moulding' need not be deliberate in order to render it capable of distorting the search for truth[5]. Although it may well be an unavoidable consequence of the requirement to pay expert witnesses to give evidence, the reality of this problem is widely recognised. Although Lord Woolf may have popularised the 'hired guns expression' he is not alone in his adoption of the notion[6].

Apart from any lack of objectivity which may be associated with the fact of receipt of payment for the report, there is a quite different type of bias which attaches, to some extent I suggest almost invariably, in the context of the treater/patient relationship.

Although there appears to be little discussion of this notion in the Australian context, I propose the view that treating medical practitioners ought never be qualified as expert witnesses for the purposes of a contested hearing. Recognising that this raises issues about what use should be made of treater's report at initial decision-making and how the likely cost of requiring to obtain independent medical evidence can be met, nonetheless, I consider that it is unrealistic and unreasonable to require a treating medical practitioner (particularly in psychiatric or psychological medicine) to put above their obligation to their patient the required obligation to the Court. This is not to suggest that such people could not give evidence of their records and their observations but beyond that to require them to give 'independent evidence' would be akin to asking counsel to give a truly unbiased summing up. Despite all best efforts, the perspective would be skewed by prior knowledge and belief.

I was comforted on checking the website of the Royal Australian and New Zealand College of Psychiatrists in preparing a case for hearing this week, that the College officially takes a similar view. I have attached as Appendix A copies of the College's *Guide to Ethical Principles On Medico-Legal Reports* and *Ethical Guidelines for Independent Medical Examination and Report Preparation by Psychiatrists* in this respect. I invite you to consider this document in conjunction with the Federal Court's guidelines on expert witnesses. An even more fascinating exercise might be to consider the College Code alongside the next 'independent medicolegal' report you receive. I am sure that it is not only in the Australian Capital Territory that one might identify a 'medicolegal', briefed as such, converted to a treater, purporting to give 'independent' expert evidence. The situation may be compounded, as in my recent experience, by a retrospective request to a GP for a referral to cover the

HIC's requirements for a genuine medical referral. Such a conflation of roles must be of concern to tribunals receiving evidence.

The experts' discomfort

Concerns about the taking of expert evidence do not belong solely to the parties or tribunal; the experts themselves often express angst or frustration over the process by which their evidence is adduced or tested. It has been said that 'there is wide concern in the medical community with regards to the adversarial process involved in obtaining our opinions. There is a wide perception in the medical profession that important medical principles and reasoning often does not seem to be understood by the Courts'.[7] Other than in the most phlegmatic of witnesses, this can produce evidence which comes across as defensive, argumentative, arrogant, confused, or otherwise distracting from its content.

The complexity of evidence and the medical controversy

In most cases, medical issues can be understood by legal representatives who have conferred with their experts and at least crudely conveyed to the Tribunal receiving the evidence. Despite the ability of witnesses and their representatives to convey a position, though, if this position forms part of a medical controversy, it is highly likely that in cross-examining, any clarity is soon obfuscated by the very issues which are the source of the controversy, frequently exacerbated by the bristling of egos on the line. If a whole medical community is unable to be generally satisfied on an issue, how is the decision-maker to deal with the conflict?

Inconsistency between the scientific and legal concepts of proof: a case in point 'Chronic Pain Syndrome'

Former Justice Gordon Samuels wrote on distinguishing between scientific and legal proof:

> The procedure adopted in our courts tends to exacerbate fundamental differences in approach between doctors and lawyers. Medicine is a science and law is not. Developments in medicine are made by experiment and observation; in law they are made by the decisions of legislatures and judges. A medical fact is one which cane be empirically supported or clinically determined; a legal fact is one which is more probable than other countervailing facts.[8]

It has been recognised both in the common law and the administrative law contexts that actual medical diagnosis is not an absolute prerequisite to finding 'damage' in the former case or 'injury' in the latter. In *Australian Postal Corporation v Lucas (now Owen)*[9] Burchett J said at page 272:

> *Re Musumeci* was a rare case, and the point made in it was a very special one. I do not wish to cast any doubt upon the conclusion that, given an incapacitating condition is satisfactorily shown, the mere fact that the diagnosis of its medical nature may not be able to be made precisely, though obviously a fact which might militate against a finding of a causal link with employment, will not necessarily present an insuperable obstacle to such a finding. It must depend on the evidence. Nor is it to be doubted that proof of incapacitating pain may be relevant to show an aggravation: cf *Commonwealth of Australia v Beattie* (1981) 35 ALR 369 at 378, per Evatt and Sheppard JJ.

In 1990, DP Todd of the Tribunal said in *Re Beer and Australian Telecommunications Commission*[10]:

> 56. Putting aside then the false case, the unproven case and the clearly diagnosed case, we can then be left with the case of the greatest difficulty, namely the case of allegedly persisting pain in the upper extremities accompanied by a range of medical and/or para-medical evidence supporting the claims of the employee but without specific medical diagnosis of a recognised disease entity. As to this there is not only no unanimity amongst the medical profession, there is instead quite bitter division, with polarised attitudes and sometimes express or implied condemnation of those who hold other views.

> Some of the evidence can be disquieting and bordering on the demeaning. I have to say that the least toleration of opposing or alternative views tends to come from some of those at the pole which represents the view that unless a well-recognised disease entity, such as one of those referred to above, can be diagnosed, or a specific lesion in the medical sense identified, the claimant's allegations of pain must be rejected and the claimant inferentially dismissed as a `malingerer'. He went on to state, "What I am saying is that proven pain may in some circumstances fall within the statutory definition of disease notwithstanding that medical science is unable to agree on the 'label' that is to be attached to the condition that gives rise to the production of non-transient symptoms that constitute the pain."
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> This approach was adopted by DP Forgie in *Re Beer and Telstra Corporation Limited [1994] AATA 9838* and has found favour since.

Chronic pain syndrome is a non-diagnosis that appears to be incapable of definition other than by reference to itself; that is chronic pain syndrome is a symptom of pain which is chronic. As a syndrome (and I distinguish this from the readily understandable notion of 'chronic pain'), its aetiology is ephemeral. Simplistically, the 'physical' doctors say it's not physical, the psychiatric fraternity say that alone, it's not a psychiatric phenomenon. The 'new breed' of pain specialists say it's both but they cannot tell you what came first, the physical or the psychological, or indeed where one ends and the other begins.

All of the experts are prepared to use the term yet few are able to prescribe any substantive meaning to it. It will not be constrained by the recognised phenomenon of Chronic Regional Pain Syndromes Types 1 and 11, with their clearly delineated diagnostic criteria. It will not be constrained within the DSM 'Pain Syndrome' model. So what is it? What is its aetiology? And, significantly, from the perspective of this paper, who can be relied up in giving evidence about it? Is it appropriate to throw up the epidemiological evidence which indicates that the syndrome is far more common in relation to work injuries than to any other class of injury? Is it appropriate to link it to the debunked 1980's RSI phenomenon? In practical terms, this syndrome creates a huge challenge to the Tribunal. The issue is far too large for serious consideration in this paper. And chronic pain syndrome is not the only beast of its type. It is, however, a very interesting controversy against which to test views regarding expert evidence: qualifying it, clarifying it and assessing it.

Use of epidemiological evidence

Epidemiological evidence is a specific example of evidence which by its very nature creates a challenge to the legal approach to proof. Such evidence addresses scientific probability (in a manner somewhat challenging to many mortals!). It is potentially valuable evidence in determining questions of causation, yet introducing and dealing with such evidence in a way that does not derogate from its scientific validity is fraught with difficulty for the almost invariably non-expert counsel. Such evidence is a most obvious example by which the artificial legal test of 'proof' is compounded by factoring in an expert assessment based on the notion of possibilities and probabilities in a manner more scientific to the law but by its very nature not directly applicable to the individual case.

The first issue is what qualifies as 'epidemiological evidence'? Is it enough, for example, to summons all the personnel records of all staff in a particular role in an organisation in order to prove that there was a high level of a particular type of injury occurring?

The issue was comprehensively addressed in *Seltsam Pty Limited v McGuiness; James Hardie & Coy Pty Limited v McGuiness*[11], a case dealing with the connection between exposure to asbestos and kidney disease, by Spiegelman CJ, Stein JA, Davies AJA. Their Honours concluded:

> 79 Evidence of possibility, including expert evidence of possibility expressed in opinion form and evidence of possibility from epidemiological research or other statistical indicators, is admissible and

must be weighed in the balance with other factors, when determining whether or not, on the balance of probabilities, an inference of causation in a specific case could or should be drawn. Where, however, the whole of the evidence does not rise above the level of possibility, either alone or cumulatively, such an inference is not open to be drawn….

119 There is a tension between the suggestion that any increased risk is sufficient to constitute a "material contribution", and the clear line of authority that a mere possibility is not sufficient to establish causation for legal purposes. The latter is too well established to be qualified by the former. The reconciliation between the two kinds of references is to be found in the fact that, as in Chappel v Hart and in the cases that suggest the former, the actual risk had materialised. The "possibility" or "risk" that X might cause Y had in fact eventuated, not in the sense that X happened and Y had also happened, but that it was undisputed that Y had happened because of X.

120 The epidemiological evidence in the present case can be expressed in terms of "increased risk". However, in its application to determining causation in the specific case of the Respondent that evidence never rises above the level of a possibility. Whether or not the increased risk "eventuated", is the issue which must be determined. The Respondent's reliance on the passage from McHugh J was, in my opinion, misplaced."

The dilemma is that such evidence is highly likely to be apposite to the types of medical issues that arise before Tribunal's. However, the cost of calling experts to introduce and explain it is likely to be prohibitive to the parties. Is it appropriate then to go the Clayton's line, "the Internet research"?

The Internet is, of course, an amazing and valuable tool, one to which parties and Tribunal's alike have reference to varying degrees in attempts to understand everything from the anatomy of the knee to the relationship of stress to shingles in the adult population. Almost any position one wishes to argue appears to find some support somewhere on the Net. In a Tribunal not bound by the rules of evidence, just what freedom should be allowed to introduce material available on the Internet? Should all such material be introduced via an expert, even if not sourced or relied upon by that expert? In the famous words of Janis Joplin, in this respect could it be that "freedom's just another word for nothing left to lose"?[12]

How the broader Court system has addressed these issues

The Courts have partly through legislation and partly through internal initiative in developing their own rules, sought to redress concerns associated with receipt of expert evidence in a number of ways. It is beyond the scope of this paper to specify each jurisdiction specific response. Thus the following is a general summation.

Codes of conduct for witnesses[13]

I have appended the Federal Court Guidelines for Expert Witnesses. Of note is the requirement that the expert's duty to the Court is described as both overriding and paramount. The conflict that this creates in relation to a treating expert has been touched upon above. What the Guidelines usefully do is indicate the basic requirements of an expert report. However, in my respectful submission, the Code does not go nearly far enough in providing clear prescription of what might be truly helpful for those needing to interpret the medical report. In noting this, the fact that the Guidelines apply to all manner of experts should be taken into account. A more specific document may not be appropriate across the board but it may be that some types of expert evidence lend themselves to a more prescriptive approach.

Introduction of single expert rules

The push towards the 'single expert' was sold to the legislature on the basis both of simplifying complex technical issues and reducing court time expended. It has had supporters and detractors in Australia.[14] McClennan J points to the efficiency of the system in his experience (which commenced with the Land and Environment Court and therefore a different type of expert). He does note the benefit in a single expert collating factual material. Again in the context of medical examinations, this may not be appropriate, particularly if an

individual is being assessed from the perspective of a different specialisation. He notes that cost may be less as written reports may not be required. However, there are many potential problems with the single expert approach in medical matters, not least of which in a small jurisdiction would be sourcing them. There is a real danger that one 'side' or the other may come to feel that a particular court-appointed expert or cadre of experts supports a particular approach on issues. Even if that is a 'moderate' view, it will still only be one view. What material will be available to test the views of the single expert if no other opinion has been obtained? If one has, does the cost simply become a hidden cost?

If a single expert approach is appropriate, consideration could be given in the Commonwealth to the use of internal experts in say, the workers' compensation jurisdiction, in order to head off at least some medical controversies at the pass. This would of course be the subject of criticism by many disaffected claimants but even so, such an approach might see some sensible questions being asked at an early stage which, even if not finally determinative of issues, might assist in delineation of them down the track.

One further question which arises is would a treater to be deemed an expert for the purpose of such rules? Would the treater's records be admissible in such circumstances or would this offend the single expert provision. The scope of this paper prevents detailed consideration of this issue. However, I do note that it has been considered in the context of the ACT Supreme Court Rules and general practitioner notes in *Pappas v Noble*[15], a decision of Master Harper.

Concurrent evidence

This approach has been trialled increasingly. There appears to be some consensus of its value amongst tribunals and experts. Counsel and solicitors appear on occasions less inclined to engage with this process. The overwhelming advantage of it is, though, that parties can ensure that all relevant evidence is provided to all expert witnesses with at least some time to consider it. This is not always realistically achievable throughout a hearing, particularly where evidence is being given remotely.

How the AAT experience is akin to the Court experience

The AAT is, of course, in the enviable position of being able to determine its own procedure[16] and is not bound by the rules of evidence, subject to acting within the law. The primary consideration is therefore the provision of procedural fairness to the parties. Whilst this provides for desirable procedural flexibility, one might consider that the converse is the potential for the testing of expert evidence to be less rigorous. In practice, I have found the opposite to be the case. Whilst the stricter application of the rules relating to service of reports and not calling evidence outside of those reports appears to operate as a limit to examination by advocates in the general Courts, that does not, in my experience, appear to be the case in the Tribunal. The result may be a broader ranging inquiry, which is beneficial to ascertaining the truth in so far as it is possible, provided that inquiry is restricted sensibly by the rules relating to relevance, proof of assumptions and operating within expertise.

The matters which come before the Tribunal for determination, at least in part, of medical issues, are frequently run in a very court-like manner, albeit with less formality. The calling and order of expert witnesses is largely left to the discretion of the parties; the form of examination follows the usual order (albeit with perhaps greater flexibility to recall or reopen issues than in a Court); although the rules of evidence are far from strictly applied to questions asked, the AAT will rule of 'objectionable' questions, albeit that the criterion for assessing the objectionability of them is more likely to be relevance and weight than strict admissibility. Tribunal members vary as to the level of questioning they might undertake but on the whole that is reserved for the end of the parties questioning with the opportunity to

question further if the need arises. Therefore the calling of expert evidence operates in largely the same way in the AAT as it does in most Courts.

So, given the clear flexibility given to it by the AAT Act, why is the Tribunal so traditional in its approach?

Is it because cases are frequently conducted by counsel who are used to doing so in the traditional manner?

Is it because little thought is given to varying the norm?

Is it because there is a fear of being challenged, particularly on the basis of denial of procedural fairness, if a different approach is taken?

Or is it because, on the whole, this approach works reasonably well in identifying the issues and assisting the Tribunal's deliberations?

I do not know the answer to that. What I do know is that shoddy, superficial reports prepared upon unknown assumptions and providing unsupported conclusions are common place. I do know that attempting to rectify that through cross-examination can be difficult and, in all honesty, at times not in one's client's interest. Despite the generally indulgent attitude of the Tribunal to legal representatives, attempting to properly redress these problems, in cases in which there is as a matter of course voluminous material, is time consuming and, at times, no doubt downright irritating to those obliged to observe the process.

The function of the Tribunal is assessing expert evidence is largely coextensive with task of judicial officers carrying out the same function, although in truth the task can be made more difficult by the legislative paradigm in which that task must be carried out.

Important differences between the AAT functions

Different legal tests being applied

Is it significant in terms of how expert evidence is treated that the legal tests being applied by the AAT arise under specific statutory provision which may or may not have overlap with the tests applied in the Courts? I submit that it is. The reasons for this view is that there are a series of very specific tests which the AAT has to apply which impact upon the way in which experts might be required to consider a matter, that is statutory parameters are put around. One example is the application of the 'reasonable hypothesis' in Veterans' Review matters; another is application of the Impairment Tables under the Social Security Act. These are two very obvious instances of situations in which the expert's evidence will be curtailed by an absolute requirement. Taking the latter of these the following is an excerpt form the Introduction to the Schedule 1B–Tables for the assessment of work-related impairment for disability support pension:

> 4. A rating is only to be assigned after a comprehensive history and examination. For a rating to be assigned the condition must be a fully documented, diagnosed condition which has been investigated, treated and stabilised. The first step is thus to establish a working diagnosis based on the best available evidence. Arrangements should be made for investigation of poorly defined conditions before considering assigning an impairment rating. In particular where the nature or severity of a psychiatric (or intellectual) disorder is unclear appropriate investigation should be arranged.
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> 5. The condition must be considered to be permanent. Once a condition has been diagnosed, treated and stabilised, it is accepted as being permanent if in the light of available evidence it is more likely than not that it will persist for the foreseeable future. This will be taken as lasting for more than

two years. A condition may be considered fully stabilised if it is unlikely that there will be any significant functional improvement, with or without reasonable treatment, within the next 2 years.

6. In order to assess whether a condition is fully diagnosed, treated and stabilised, one must consider:

- what treatment or rehabilitation has occurred;
- whether treatment is still continuing or is planned in the near future;
- whether any further reasonable medical treatment is likely to lead to significant functional improvement within the next 2 years.

In this context, reasonable treatment is taken to be:

- treatment that is feasible and accessible ie, available locally at a reasonable cost;
- where a substantial improvement can reliably be expected and where the treatment or procedure is of a type regularly undertaken or performed, with a high success rate and low risk to the patient.

It is assumed that a person will generally wish to pursue any reasonable treatment that will improve or alleviate an impairment, unless that treatment has associated risks or side effects which are unacceptable to the person. In those cases where significant functional improvement is not expected or where there is a medical or other compelling reason for a person not undertaking further treatment, it may be reasonable to consider the condition stabilised.

In exceptional circumstances, where a condition was considered not stabilised and a permanent impairment rating not assigned because reasonable treatment for a specific condition has not been undertaken, the medical officer should:

- evaluate and document the probable outcome of treatment and the main risks and or side effects of the treatment; and
- indicate why this treatment is reasonable; and
- note the reasons why the person has chosen not to have treatment.

Clearly this is a highly prescriptive mode of ascertaining whether or not an individual potentially qualifies for a particular payment. Review of this example highlights that in assessing medical evidence in the administrative review context, the type of evidence which must be extracted from the expert can be quite explicit. It is highly likely that there will be some reluctance in the witness to fit his or her evidence to the word pictures required, particularly in the case of a treating practitioner whose primary concern generally is the running of a medical practice and restoring of patients to well-being rather than completion of forms or reports addressing notions which to them may seem artificial or at times even nonsensical.

On the other hand, for a competent practitioner, what this and similar frameworks provide is the opportunity to elicit from the expert very specific information to assist the Tribunal's deliberations.

Another feature of administrative review, is that the conclusion reached is not a 'once and for all' outcome in some cases. The Tribunal having made its decision, the administrator is then often required to 'live with' that decision in terms of implementing payments on the basis of it, or utilising it as a basis for future management of a claim. In that regard, any pronouncements that the Tribunal make as to the expert evidence may well resound down the years. If the expert evidence presented to the Tribunal is unclear, the Tribunal must still do its best to address it. However, the resulting decision may obfuscate rather than clarify matters for future management if the Tribunal has been unable to arrive at clear and convincing conclusions.

This leads also to a consideration of the form of appeal that is available. As appeals are limited to appeals on questions of law (albeit there is limited power now in the Federal Court to make findings of fact[17]) except in extreme circumstances of perverse reasoning[18], what might otherwise be seen as 'errors' in the Tribunal's assessment of expert evidence will go

unchallenged. Thus the obligation to have that evidence presented clearly is, if anything, even greater than in a civil court.

What steps have been taken

Noting that the AAT has wide power to determine its own procedure, what steps has it taken regarding efficient and effective use of expert evidence?

The Tribunal has fairly standard rules regarding the exchange of expert reports, in order to narrow, where possible, the issue between the parties. These have recently been reiterated in the long-awaited *Guide to the Workers Compensation System* (March 2007):

> The Tribunal expects that, in general, all evidence to be relied on at the hearing will have been identified during the pre-hearing process. Parties must comply with any directions issued or timetables set for giving documents or other material to the Tribunal and the other party prior to the hearing. If a party anticipates or experiences any difficulty in meeting these obligations, this must be brought to the attention of the Tribunal as soon as possible.
>
> Applicants should be aware that, if they wish to present any matter in evidence and that matter was not disclosed to the Tribunal at least 28 days before the hearing date, that matter is not admissible as evidence without the leave of the Tribunal: see subsection 66(1) of the *Safety, Rehabilitation and Compensation Act 1988* and subsection 90(1) of the *Seafarers Rehabilitation and Compensation Act 1992*.

The Concurrent Evidence Trial was reported on in November 2005, now over 18 months ago.[19] The executive summary indicates that the members were keen on the process and that in most cases Tribunal time spent in receiving the evidence was the same, or less than, when other forms of evidence were used. It is important to note that for individual doctors, though, this can be a more time-consuming process (and therefore more costly for the parties). I anticipate that this may be less so if the procedure was more widely used and medical experts were briefed by agreement earlier on in the process, that is, if the possibility of concurrent evidence was identified early and doctors briefed with fuller materials earlier in the process. The process does not appear to have universally flourished, despite the positive trial. I suspect that a significant reason for that is late consideration of it as an option, anticipated cost and some reluctance from uninitiated legal representatives. If the process is not to lapse, proactive case identification by Registrars and Members will be required.

The AAT in Canberra in particular makes extensive use of telephone evidence although I understand from experience that this might not be so common elsewhere. It remains a matter for the Tribunal's discretion as to whether they feel the need to 'eyeball' expert witnesses. I suspect, however, that if reports were better prepared this may be less of an imperative, with an associated cost saving.

What further steps might be considered

The AAT may be underutilising its great flexibility procedurally. For example in some cases, it might be appropriate to have mixed concurrent and traditional evidence, to have expert witnesses sit in on the applicant's evidence or, where credit is identified as a primary issue, to separate in time the lay from the medical evidence, in order to possibly avoid medical costs.

I consider that it is highly desirable that the AAT expedite the introduction of expert and particularly a medical expert Code of Conduct. Various Codes are often seen appended to reports and may or may not be acknowledged. I consider that a Code which also provides a report template and provision for confirmation of the content of the Code would be helpful, as would some sort of sanction for obvious breach of it. Statements that an expert intends to abide by the Code are frequently made but perhaps not compelling. A structured report

would provide a practical way of ensuring not so much objectivity as one extra tool in the process of measuring the coherence and reliability of reports. This approach is supported by the following extract from *HG v R* per Gleeson CJ at [39]:

> The opinions of Mr McCombie were never expressed in admissible form. An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question.[9] Argument in this Court proceeded upon the basis that it was possible to identify from Mr McCombie's written report some facts which he either observed or accepted, and which could be distinguished from his expressions of expert opinion. Even so, the provisions of s 79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.

In dealing with non-legally qualified witnesses, whilst it would not replace proper briefing practices, addressing issues of form in a document may go some way to filling the lacuna left by sloppy briefing or refusal, intended or otherwise, of the expert to address the issues raised by the briefing.

In brief, here are a series of other initiatives which might be considered by the Tribunal is addressing expert evidence:

In light of the apparent benefits, there may be some utility in the Tribunal actively encouraging concurrent evidence in appropriate cases.

I suggest that it would be helpful if Tribunals openly and proactively engaged with parties as to issues of concern regarding the evidence before them, if views have been formulated. This occurs to a degree but there does appear to be some reticence in some members about doing this at a time when it might influence the extraction of evidence. This is probably a function of the fact that many members come from a traditional legal background in which too interventionist an approach is frowned upon.

I suggest that there is a role for the censuring inappropriate behaviour by experts. Those that frequent the Tribunal on a regular basis would no doubt benefit, as would the interests of justice in due course, from moderate comment as to the helpfulness or otherwise of certain forms of evidence given.

I query whether there is scope for greater and more open use of specialist tribunals. There appear to be somewhat mixed messages from the judiciary as to just what role a specialist member might perform, although conducting an actual assessment in the hearing has been frowned upon. Varying comment has been made by the Federal Court as to the significance of having a specialist member in a hearing. My point is that open reference to the input of a specialist member may be helpful to the process.

Finally, it may be that the Federal Court will in future require a more proactive approach from the Tribunal in exercising its powers or in harnessing the assistance of the Respondent when the Tribunal forms the view that further expert evidence is required before it can reach the decision required of it. Comment to this effect was made by Gyles J in *Harris v Secretary, Department of Employment and Workplace Relations*[20]:

> 19 The AAT stands in the shoes of the Department and is in precisely the same situation as the decision maker. The fact that, as a practical matter, it chooses to conduct quasi-adversarial proceedings and does not have available direct access to medical specialists for the purposes of investigation, does not change the nature of the function being performed by it. The provisions of *s 33* of the AAT Act give ample scope for the AAT to arrange investigation of a claim. The decision maker is bound to use his or her best endeavours to assist the AAT to make its decision (s 33(1AA)). The AAT

> has inquisitorial powers and may exercise them where appropriate. (See, generally, *McDonald v Director-General of Social Security* (1984) 1 FCR 354.) It is not, of course, every case that will require such measures. In general, an applicant for a benefit must satisfy the decision maker of the necessary criteria. However, cases such as this may demand such an approach (cf *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169–170; *Luu v Renevier* (1989) 91 ALR 39 at 49–50). The AAT did not arrange investigations to test the validity of the speculation about each condition. It should have made a decision made on the material before it without taking account of hypothetical third party investigations.

Conclusion

The challenges relating to expert evidence are no less great in the Tribunal system than in the Court system as a whole. What complicates the issue is further is the overarching requirement that 'in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'.[21] Citizens who come before the Tribunal, markedly more so that those going to Court, frequently cannot expect a large bucket of money at the conclusion of a successful case. What they might get is their pension back, or incapacity payments that they have struggled without for frequently well in excess of a year. Although costs are awarded in some of the Tribunal's jurisdictions, even where that is so, they not infrequently leave a 'gap' to be met by the successful applicant. On the other side of the coin, the Commonwealth, constrained by the legislative framework in place, is often obliged to run cases the legal cost of which far outweighs what might be required to be paid if the case was not run. Thus any provision which increases efficiency must also address its cost implications. Along with this, the integrity of the system must be maintained such that those who participate in it can conclude that, although they may not like the outcome, they are content that the process was appropriate.

THE ROYAL AUSTRALIAN AND NEW ZEALAND COLLEGE OF PSYCHIATRISTS

Ethical Guideline #1

GUIDE TO ETHICAL PRINCIPLES ON MEDICO-LEGAL REPORTS

1. All psychiatrists should exercise the greatest care to observe the relevant Australian and New Zealand laws and regulations concerning medico-legal assessments and reports.
2. No matter what the referral, it is a breach of the Australian National Health Services Act to knowingly itemise an account for the purpose of payments of medical benefits for a service performed for medico-legal purposes.
3. Any psychiatrist who has any doubt as to the *bona fides* of a referral should go no further with the assessment until the matter has been clarified with the patient and/or referring doctor.
4. The psychiatrist should avoid being placed in a situation in which there are both therapeutic and medico-legal aspects to an assessment. The psychiatrist should advise the patient/lawyer/referring doctor that these two aspects of management should be carried out by different psychiatrists. This does not preclude a psychiatrist from providing a treating doctor's report for a patient already under his/her care
5. Psychiatrists undertaking medico-legal assessments and preparing reports for use by the Court should familiarise themselves with the "Expert Witness Code of Conduct" relevant to the jurisdiction in which the report will be used, and ensure that the assessment and report are in accordance with any such Code that is applicable.
6. Psychiatrists preparing medico-legal or similar reports must not make disparaging or unprofessional comments about colleagues. While it might be appropriate to indicate disagreement in relation to diagnosis, treatment or management of a particular patient, such comments must be expressed in acceptable and respectful language and should not be a personal attack on a colleague, or their professionalism.
7. In expressing a professional opinion in the context of a medico-legal report, psychiatrists should not offer opinions outside their specific field of expertise; all such opinions must be within the bounds of reasonable medical certainty and the generally accepted knowledge-base of the profession.
8. It is unethical to prepare medico-legal reports about a person with whom the psychiatrist has a current, or has had a previous, personal relationship of whatever nature.
9. Psychiatrists must never amend a medico-legal report at the request of any party. If additional documentation is provided or a clarification is requested, that should be dealt with by way of a supplementary report.

Adopted: October 1980
Amended: GC2005/3 R.24
Currency: until withdrawn

THE ROYAL AUSTRALIAN AND NEW ZEALAND COLLEGE OF PSYCHIATRISTS

Ethical Guideline #9

ETHICAL GUIDELINES FOR INDEPENDENT MEDICAL EXAMINATION[1] AND REPORT PREPARATION BY PSYCHIATRISTS.

1. PREAMBLE

1.1 The RANZCP is dedicated to the highest standards of practice in the provision of independent medical examination and report preparation by psychiatrists. The College code provides the broad ethical framework for these Guidelines; the Guidelines must be read in conjunction with the RANZCP Code of Ethics. Relevant College Guidelines may also require attention.

1.2 Independent medical examination and report preparation by psychiatrists requires adherence to the discipline of psychiatry in which scientific and clinical expertise is applied to psychiatric issues in legal contexts. Independent medical examination and report writing by psychiatrists should be practised in accordance with guidelines and ethical principles enunciated by the profession of psychiatry.

1.3 These guidelines establish a basic standard of ethical practice in the preparation of independent medical examination and reports but they are not relevant in all medicolegal circumstances. The RANZCP recognises that in a number of circumstances treating psychiatrists will be required to report in medicolegal settings, especially psychiatrists working in rural and remote districts and criminal jurisdictions when statutory requirements apply to the treating psychiatrist. This does not constitute an independent medical examination and report by a psychiatrist. In this circumstance the psychiatrist must state his or her role as a past or present treating practitioner.

2 CONSENT

Consent is one of the core values of ethical practice of medicine and psychiatry. It reflects respect for the person, a fundamental principle in the practices of medicine, psychiatry and forensic psychiatry. Obtaining informed consent is an expression of this respect. Obtaining informed consent is not possible in special circumstances.

3 PRIVACY

Psychiatrists should inform the examinee of the arrangements made for their privacy and that limited confidentiality will apply to the preparation of the report.

4 EXPERTISE

Psychiatrists must present their qualifications accurately and precisely.

5 DISCLOSURE OF INFORMATION SOURCES

Psychiatrists must disclose all sources of information provided by the agency requesting evaluation and any other parties.

6 MAINTENANCE OF PROFESSIONAL STANDARDS

Continuing medical education is a fundamental responsibility of all psychiatrists. Opinions in independent medical reports provided by psychiatrists should be based on contemporary scientific standards.

7 PROFESSIONAL BOUNDARIES

Any comment concerning difference of opinion with a colleague should be confined to matters of substance and expressed in professional terms.

Psychiatrists must use their best endeavours to identify and disclose actual and potential conflicts of interest.

A psychiatrist seeing a person referred for an independent medical examination and report should not provide routine treatment for that person. Emergency treatment should only be provided where no reasonable alternative exists and immediate referral is then made to a treating agency for ongoing care.

Fee agreements dependent upon a particular outcome are unethical.

Adopted: May 2003 (GC2003/1.R31)
Currency: Until withdrawn

Federal Court of Australia

Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia

This replaces the Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia issued on 19 March 2004.

Practitioners should give a copy of the following guidelines to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness (see **- Part 3.3 - Opinion** of the *Evidence Act 1995* (Cth)).

M.E.J. BLACK
Chief Justice
11 April 2007

Explanatory Memorandum

The guidelines are not intended to address all aspects of an expert witness's duties, but are intended to facilitate the admission of opinion evidence (footnote #1), and to assist experts to understand in general terms what the Court expects of them. Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them.

Ways by which an expert witness giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:

(a) is clearly expressed and not argumentative in tone;

(b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;

(c) identifies with precision the factual premises upon which the opinion is based;

(d) explains the process of reasoning by which the expert reached the opinion expressed in the report;

(e) is confined to the area or areas of the expert's specialised knowledge; and

(f) identifies any pre-existing relationship (such as that of treating medical practitioner or a firm's accountant) between the author of the report, or his or her firm, company etc, and a party to the litigation.

An expert is not disqualified from giving evidence by reason only of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed. Where an expert has such a relationship the expert may need to pay particular attention to the identification of the factual premises upon which the expert's opinion is based. The expert should make it clear whether, and to what extent, the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness) derived from the ongoing relationship rather than on factual premises or assumptions provided to the expert by way of instructions.

All experts need to be aware that if they participate to a significant degree in the process of formulating and preparing the case of a party, they may find it difficult to maintain objectivity.

An expert witness does not compromise objectivity by defending, forcefully if necessary, an opinion based on the expert's specialised knowledge which is genuinely held but may do so if the expert is, for example, unwilling to give consideration to alternative factual premises or is unwilling, where appropriate, to acknowledge recognised differences of opinion or approach between experts in the relevant discipline.

Some expert evidence is necessarily evaluative in character and, to an extent, argumentative. Some evidence by economists about the definition of the relevant market in competition law cases and evidence by anthropologists about the identification of a traditional society for the purposes of native title applications may be of such a character. The Court has a discretion to treat essentially argumentative evidence as submission, see Order 10 paragraph 1(2)(j).

The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (eg some aspects of economic "evidence" in competition law cases) their literal interpretation may prove unworkable. The Court expects legal practitioners and experts to work together to ensure that the guidelines are implemented in a practically sensible way which ensures that they achieve their intended purpose.

Guidelines

1. General Duty to the Court (footnote #2)

1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.

1.2 An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential (footnote #3).

1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

2. The Form of the Expert Evidence (footnote #4)

2.1 An expert's written report must give details of the expert's qualifications and of the literature or other material used in making the report.

2.2 All assumptions of fact made by the expert should be clearly and fully stated.

2.3 The report should identify, and state the qualifications, of each person who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment.

2.4 Where several opinions are provided in the report, the expert should summarise them.

2.5 The expert should give the reasons for each opinion.

2.6 At the end of the report the expert should declare that "[the expert] has *made all the inquiries that* [the expert] *believes are desirable and appropriate and that no matters of significance that* [the expert] *regards as relevant have, to* [the expert's] *knowledge, been withheld from the Court*."

2.7 There should be included in or attached to the report; (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials that the expert has been instructed to consider.

2.8 If, after exchange of reports or at any other stage, an expert witness changes a material opinion, having read another expert's report or for any other reason, the change should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court (footnote #5).

2.9 If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report (footnote #5).

2.10 The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.

2.11 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports (footnote #6).

3. Experts' Conference

3.1 If experts retained by the parties meet at the direction of the Court, it would be improper for an expert to be given, or to accept, instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.

footnote #1
As to the distinction between expert opinion evidence and expert assistance see *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 per Allsop J at [676].

footnote #2
See rule 35.3 Civil Procedure Rules (UK); see also Lord Woolf "Medics, Lawyers and the Courts" [1997] 16 CJQ 302 at 313.

footnote #3
See *Sampi v State of Western Australia* [2005] FCA 777 at [792]-[793], and *ACCC v Liquorland and Woolworths* [2006] FCA 826 at [836]-[842]

footnote #4
See rule 35.10 Civil Procedure Rules (UK) and Practice Direction 35 – Experts and Assessors (UK); *HG v the Queen* (1999) 197 CLR 414 per Gleeson CJ at [39]-[43]; *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2000] FCA 1463 (FC) at [17]-[23]

footnote #5
The *"Ikarian Reefer"* [1993] 20 FSR 563 at 565

footnote #6
The *"Ikarian Reefer"* [1993] 20 FSR 563 at 565-566. See also Ormrod 'Scientific Evidence in Court' [1968] Crim LR 240.

Endnotes

1 Access to Justice – Final Report Lord Woolf 1996, the Ipp Report 2002

2 *Rodrigues v Telstra Corporation Ltd* [200] FCA 30 per Keifel J: '25 The Tribunal is not bound by the rules of evidence (s *33 Administrative Appeals Tribunal Act 1975* (Cth)) and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force: *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492, referring to *Consolidated Edison Co v National Labour Relations Board* (1938) 305 US 197, 229; *The King v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256. The drawing of an inference without evidence is an error of law: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 31, 355-356; *Repatriation Commission v Maley* (1991) 24 ALD 43 (Full Court). Similarly such error is shown when the Tribunal bases its conclusion on its own view of a matter which requires evidence. In *Collector of Customs (Tasmania) v Flinders Island Community Association* (1985) 60 ALR 717, 722 a Full Court of this Court held that it was unjustifiable, and therefore legally erroneous, for a Tribunal to base its conclusion upon its own understanding of traditional aboriginal concepts of community ownership and interests, in the absence of any evidence on the matter.

26 It may be said that expert evidence is sometimes over-utilised and is called in situations where an arbiter of fact is in a position to determine the matter for itself. Sometimes all that is necessary is for a method or process to be explained, so that the Court or Tribunal can then apply it to the facts it finds. On the other hand, there are cases where a whole question is, in effect, relegated to experts to give evidence upon it. This was such a case. The Tribunal was not put in a position where it could simply draw its own inferences. In an area which required an understanding of a disorder it could only receive the opinions, have the bases for them explained if they differed and apply logic to determine which were to be accepted.

1 (1999) 197 CLR 414
2 (2001) 52 NSWLR 705
3 (Unreported, N395 of 1991)
4 Federal Court Judge and current President of the Administrative Appeals Tribunal
5 For an interesting treatise on the fluid concept of 'objectivity', see Gary Edmond *After Objectivity: Expert Evidence and Procedural Reform* [2003] SydLRev 8
6 See McCellan J *Expert Evidence – Aces up your Sleeve?* Presented to the Annual Conference of the Industrial Relations Commission of NSW 20 October 2006
7 M Nothling, *Expert Medical Evidence: The Australian Medical Association's Position* http://www.aija.or.au/info/expert/nothling.pdf undated
8 Gordon Samuels, *Medical Truth and Legal Proof: Changing Expectations of the Expert Witness,* MJA 1998 168
9 (1991) 25 ALD 266
10 AAT 5979, 20 June 1990
11 [2000] NSWCA 29
12 Ballad of Bobby McGee
13 Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia, 11 April 2007
14 McClennan ibid page 7, Downes J *The value of Single or Court-Appointed Experts* Paper delivered to the Australian Institute of Judicial Administration Expert Evidence Seminar, Melbourne 11 November 2005
15 [2006] ACTSC 39
16 s33(1) *Administrative Appeals Tribunal Act 1975* (Cth)
17 Section 44 now relevantly states:

(7) If a party to a proceeding before the Tribunal appeals to the Federal Court of Australia under subsection (1), the Court may make findings of fact if:

(a) the findings of fact are not inconsistent with findings of fact made by the Tribunal (other than findings made by the Tribunal as the result of an error of law); and

(b) it appears to the Court that it is convenient for the Court to make the findings of fact, having regard to:

(i) the extent (if any) to which it is necessary for facts to be found; and

(ii) the means by which those facts might be established; and

(iii) the expeditious and efficient resolution of the whole of the matter to which the proceeding before the

Tribunal relates; and

(iv) the relative expense to the parties of the Court, rather than the Tribunal, making the findings of fact; and

(v) the relative delay to the parties of the Court, rather than the Tribunal, making the findings of fact; and

(vi) whether any of the parties considers that it is appropriate for the Court, rather than the Tribunal, to make the findings of fact; and

(vii) such other matters (if any) as the Court considers relevant.

(8) For the purposes of making findings of fact under subsection (7), the Federal Court of Australia may:

(a) have regard to the evidence given in the proceeding before the Tribunal; and

(b) receive further evidence.

18 *Military Rehabilitation & Compensation Commission v SRGGGG* [2005] FCA 342 'Except in unusual cases, none of these remedies is actuated by factual errors. Thus,the purposes for the requisite giving of reasons do not include the correction of alleged factual error."' Per Madgwick J

19 And can be accessed via the AAT's website under the sub-heading Research

20 [2007] FCA 404 currently on appeal

21 AAT Act s2A