



Defence Force Remuneration Tribunal

PRACTICE STATEMENT

PROCESSES FOR THE DEFENCE FORCE ADVOCATE AND A PERSON REPRESENTING THE COMMONWEALTH TO MAKE SUBMISSIONS TO THE TRIBUNAL, FOR A PERSON OR BODY TO INTERVENE IN TRIBUNAL PROCEEDINGS, AND FOR THE REVIEW PROCESS FOR TRIBUNAL DETERMINATIONS.

MS I. ASBURY, PRESIDENT

MR A. MORRIS, MEMBER

CANBERRA, 16 AUGUST 2022

MAJGEN G. FOGARTY AO RETD, MEMBER

Introduction

This practice statement applies to processes for the Defence Force Advocate and a person representing the Commonwealth to make submissions to the Tribunal, for a person or body to intervene in Tribunal proceedings, and for the review process for Tribunal determinations.

Commencement Date

This practice statement commences with immediate effect.

Background

It is normal practice for the Australian Defence Force (ADF), through the Directorate of Military Remuneration, to apply to have matters listed for consideration by the Tribunal. The Commonwealth Advocate (the Commonwealth) - through the Australian Public Service Commission - has the ability to bring matters forward on behalf of the Minister for the Public Service.

Legislation

Subsection 58K(9) of the *Defence Act 1903* (the Act) provides that the Defence Force Advocate and a person representing the Commonwealth are entitled to be present, and to make submissions to the Tribunal, during any proceedings before the Tribunal.

Parties before the Tribunal

Defence Force Advocate. The Defence Force Advocate represents the Chief of Defence Force and members of the ADF.

A person representing the Commonwealth. The Commonwealth Advocate has the ability to bring matters forward on behalf of the Minister for the Public Service.

Listing Applications

In order to have a matter listed for the Tribunal's consideration, the ADF or the Commonwealth must formally apply in writing to the Tribunal. Following receipt of such an application, a matter number is assigned and a submission date set. An inspection and hearing will be scheduled if required.

The listing application sets in place a sequence of events for submissions and evidence and assists in developing the matter program for the Tribunal, which may include conferences, hearings and inspections. The matter is listed on the Tribunal website: www.dfrt.gov.au.

The application is to be provided to the other party.

Leave to intervene

Subsection 59(K) of the Act also provides that the Tribunal may permit other persons or bodies to be heard in proceedings.

“Where the Tribunal thinks that a person or body should be heard in relation to a matter that is being, or is to be, considered by the Tribunal, the Tribunal may permit the person or body to be present, and to make submissions to the Tribunal, during proceedings before the Tribunal in relation to that matter.”

The Tribunal requires that interveners seeking to be heard in proceedings should apply in writing to the Tribunal Secretariat. Any such application should be made as soon as practicable after a matter is notified on the website. The Tribunal will formally respond to applications in writing. In circumstances where the Tribunal permits an intervener to be heard, the interveners may make their submissions in relation to that matter either in writing or orally in hearings.

Submissions

Submissions made by the ADF are intended to deal with the development of, and changes to, ADF remuneration policies and the review of pay structures, salary and salary related allowances and remuneration arrangements.

The primary purpose of a written submission is to support applications for Tribunal determinations under the provisions of the Act to amend or set ADF remuneration through an adjustment to a salary point or allowance or an existing category; or the creation of a rate for a new employment category or allowance; or its abolition.

There are generally four types of submissions put before the Tribunal by the ADF or Commonwealth as follows:

- a. a submission to be considered 'on the papers' e.g. a simple change in nomenclature or category;
- b. a more complex submission to be considered in a hearing and with the presence of witnesses and evidence by affidavit e.g. an allowance specific to a workforce;
- c. the Annual Review of Determinations considered by the Tribunal each year under the provisions of s.58H(6) of the Act; and
- d. a report back or review required by the Tribunal to assess the progress of a determination e.g. whether it has had the desired effect.

In preparing each submission, the ADF and Commonwealth should consider topics such as the complexity of the issue, the current and future needs of the category, and the impact on the other Services if relevant.

Submissions must comply with the statutory duties imposed on the Tribunal by the Act, as well as having regard to the jurisprudence the Tribunal has developed over the years:

- be informed by the Government's workplace relations and salary policies;
- where required, link adjustments in salary and salary related allowances to efficiency gains or increased and enhanced ADF capability; and
- ensure that increases are to apply prospectively unless exceptional circumstances apply.

Submissions are to clearly justify new or changed remuneration structures having regard to work value considerations being the nature of the work, the level of skill or responsibility involved in doing the work and the conditions under which work is performed, disability, internal and external workforce relativities, and attraction and retention impacts.

All dollar figures are to be correct at the date of submission giving regard to any Workplace Remuneration Arrangement increases.

Once the ADF has made a submission the Commonwealth is required to submit a reply indicating agreement, not opposing, or opposition and reasons within 15 working days (and *vice versa*).

Each submission is to be dated on the day it is submitted to the Tribunal and not on the date the matter is scheduled to be heard.

Inspections

Inspections and visits to ADF units, ships and establishments are an important part of the Tribunal's work. Each year the Tribunal conducts a targeted visit and inspection program based on matters listed before it. The inspections and visits are coordinated by the Directorate of Military Remuneration in conjunction with the relevant Service and the Tribunal Secretariat.

Inspections are to be structured in a way that allows the Tribunal to gain an understanding of the work value and employment conditions of the category under review and must clearly demonstrate the factors that are the basis of the submission. The visits and inspections allow Tribunal members to meet with ADF members about the matter before them and on other topics related to salary and salary related allowances more generally.

The Tribunal is conscious that inspections and visits are disruptive to unit activity and expensive to conduct, therefore they are to be conducted only when essential to understand the evidence before the Tribunal.

Every effort is to be made by those involved to keep inspection parties to an absolute minimum having regard to those key ADF and Commonwealth personnel responsible for developing the submission. Except where a submission will be made jointly by all three Services, the Tribunal would generally not require attendance by representatives of the other Services. The Tribunal is to be provided with a list of participants prior to the inspection or visit.

For any person or bodies identified as an intervener in Tribunal proceedings the Tribunal will consult with the ADF and make a determination as to their attendance informed by, among other things, costs, security, logistics, safety, operational disruption, fairness and the interest of the intervener in the proceedings.

Timeline

Based on the information in this practice statement it is the listing application that sets in place a sequence of events for submission and assists in developing the program for the Tribunal that may include conferences, hearings and inspections.

The timeline does not include the holding of any without prejudice conferences or exchanges of without prejudice draft copies of submissions between the parties. The Tribunal expects that this has occurred before or at the time submissions are lodged with the Tribunal.

It is the expectation of the Tribunal that the parties will make every effort to adhere to this timeline unless exceptional circumstances apply. If this timeline cannot be met, the Tribunal

is to be informed no later than 2 weeks prior to the scheduled hearing dates so that alternative arrangements can be considered.

The timeline works back from the date the matter will be considered, either in hearing or on the papers, and is as follows:

Action	Outcome	Maximum Time frame
Listing Application submitted	Matter number assigned Type of submission agreed with Tribunal Secretariat	3 months to hearing date
Inspection arranged if required	Requirements coordinated with parties and Secretariat	2 months to hearing date
ADF submission including or other evidence to be relied upon as well as a draft determination	Formally submitted in writing to the Tribunal, Commonwealth and agreed interveners.	1 month to hearing date
Witness affidavits submitted		2 weeks to hearing date
Commonwealth and interveners submissions	In reply to the ADF. Formally submitted in writing to the Tribunal	1 week to hearing date
Hearing date	In Canberra or place as agreed Witness evidence on transcript	Interveners may make oral submissions in hearing
Decision	Tribunal publish a decision	1 month post hearing
Determination	Tribunal issue a determination	Issued with the decision.

Review processes

Subsection 58H(6) of the Act prescribes that:

“where a determination of the Tribunal in respect to the salaries and relevant allowances to be paid to members is in force, the Tribunal shall inquire into and make a further determination in respect of those salaries and allowances:

- a. within two years of the first-mentioned determination taking effect; or*
- b. if the Minister, by notice in writing given to the President, requires the Tribunal to make a further determination in respect of those salaries and allowances within a shorter period of the first-mentioned determination taking place – within the shorter period.”*

In order to meet this statutory requirement, an Annual Review process is based on the date of effect of each determination issued, and divided into one of three phases:

- a. determinations that require no further action and are considered to have ‘taken effect’ and determined either the repeal or establishment of a salary point, allowance, or workforce category (considered a ‘technical’ amendment);
- b. determinations for which the Tribunal requires a report back to be provided within a specified timeframe on the progress or function of the salary, employment category or allowance (the ‘effect’ on the workforce); and,
- c. determinations which the ADF or Tribunal identify as requiring more complex revision, requiring a comprehensive report back.

In order to ascertain which consideration will be applied in the Annual Review process, a review form is compiled by the Secretariat when each determination is issued.

This standardised form records the intended technical or workforce effect of the determination, any key performance indicators related to the effect, the level of report back needed, and the date of review required, in order to meet the Tribunal’s statutory obligations. The form is provided to the parties to ensure compliance, and provide a clear workflow for matters to return to us on a regular basis.

The completed forms are reviewed by the Tribunal throughout the year ‘on the papers’ as submitted in response, and are the first order of business for each hearing if further consideration is warranted. At the end of each calendar year, an Annual Review statement is published outlining the determinations reviewed over that period, and the outcomes of any review or report back.

Further information

This practice statement replaces in full the Tribunal Practice Statement of 23 May 2019.

The Tribunal Secretariat can be contacted on (02) 6202 3784 or via dfirt@dfirt.gov.au for further information.