

**Report of Review of Department of Education,
Employment and Workplace Relations Social Security
Appeals and Litigation Arrangements**

March 2008

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Executive Summary

On 10 December 2007 the Minister for Employment Participation, the Hon Brendan O'Connor MP asked the Department of Education, Employment and Workplace Relations (DEEWR) to review its social security appeals and litigation arrangements. The objective was to ensure that the Department's litigation activity whilst being directed to achieve outcomes that uphold the integrity of the social security system and encourage participation in education and employment related activities, nevertheless fulfil the Department's 'model litigant obligations'

The Terms of Reference for the review centre on the Department developing principles to guide future decision making.

The Review has been guided by a steering committee appointed by the Minister, which was Chaired by the Department's Secretary, Ms Lisa Paul and comprises senior departmental officers and representatives from the National Welfare Rights Network, National Legal Aid, the Attorney-General's Department and Centrelink.

The review examined the level of appeal in the former Department of Employment and Workplace Relations (DEWR) and found that in the majority of cases, where the Social Security Appeals Tribunal (SSAT) found in favour of the recipient/claimant, the DEWR accepted the decision of the SSAT and did not appeal the matter. Analysis of the outcomes of DEWR initiated appeals to the Administrative Appeals Tribunal highlighted that a large proportion (62% in 2006 - 2007) of Departmental appeals were lodged and subsequently withdrawn. This high rate of withdrawn appeals is of concern as it potentially causes inconvenience or anxiety for the income support recipient or claimant due to uncertainty of the outcome and indicates possible inefficiencies in DEWR's processes.

The steering committee, in consultation with other stakeholders, guided the development of a set of Principles to assist departmental decision makers in determining whether or not to appeal.

The Principles seek to balance the Department's obligations to protect the integrity of the social security system while also giving consideration to a range of other factors including the circumstances of individual recipients.

The key Principles are:

- Provide for honest, transparent and fair appeal processes and practices which balance all relevant considerations and promote confidence in the system for all stakeholders.
- Promote efficient and effective processes including time and cost considerations.
- Ensure the Department's appeals and litigation arrangements are transparent and assist in administering the law and provide for a fair outcome.
- Protect the integrity of the social security system.

The review also identified and recommended other areas for improving DEEWR's arrangements for the future management of social security appeals and litigation matters.

1. Overview of the Review

Background

1.1. On 10 December 2007, the Minister for Employment Participation, the Hon. Brendan O'Connor MP, asked the Department of Education, Employment and Workplace Relations (DEEWR) to review its administration of social security appeals and litigation procedures.

1.2. The Terms of Reference for the review are provided at **Appendix A**.

Scope and objective

1.3. The objective of the review was to ensure that DEEWR's activity, while being directed to achieve outcomes that uphold the integrity of the social security system and encourage participation in education and employment related activities, also fulfil the Department's 'model litigant obligations'.

1.4. The purpose of the review was to develop principles to guide future decision making in relation to appeal matters and to report to the Minister with recommendations to ensure that in future the Department's appeals process incorporates considerations of fairness, efficiency and effectiveness in maintaining the integrity of the Social Security law and government policy.

Method of Review

1.5. The review has been chaired by the Secretary of DEEWR and guided by a steering committee comprised of senior departmental officers and members of external agencies and organisations including National Welfare Rights Network, National Legal Aid, Attorney-General's Department and Centrelink.

1.6. The review has undertaken an analysis of processes and data to identify the strengths and gaps in the appeal arrangements of the former Department of Employment and Workplace Relations (DEWR). This information is provided in section 2 of this report. In particular, the review has:

- examined departmental processes and procedures for making decisions on social security appeals to the Administrative Appeals Tribunal (AAT) and Federal Court.
- analysed data on appeals made by the former Department.
- considered the implications of the *Legal Services Directions 2005*.

1.7. The review has also examined the appeals processes in other government departments to identify areas for improved processes within DEEWR. The findings are contained in section 3 of the report.

Outcomes of the Review

1.8. The learnings for the Department that have arisen from the review are outlined in section 4 of the report. The outcomes of the review will be shared with the Departments of Families, Housing, Community Services and Indigenous Affairs, Veterans' Affairs and Human Services as these agencies also have policy responsibility for, or an interest in, social security matters.

1.9. The steering committee has guided the development of a set of Principles for decision makers which incorporate the Commonwealth's *Legal Services Directions 2005* and the views of other interested stakeholder organisations. The intent of the Principles and the issues raised by stakeholders is outlined in section 5 of the report.

2. The Appeals and Decision Making Process in DEWR

The appeals process

2.1. In administering the Social Security law, the Secretary is required, by legislation¹ to have regard to principles including:

- achieving the delivery of services in a fair, courteous, prompt and cost efficient manner.
- establishing procedures to ensure that abuses of the social security system are minimised.
- the importance of the system of review of decisions under the Social Security law.
- the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal (AAT) and the Social Security Appeals Tribunal (SSAT).

2.2. Under the Social Security law, decisions are made about social security payments by a delegate of the Secretary of the Department (generally a Centrelink employee). The social security appeals process provides a number of levels of merits review on the facts of the case and also provides for judicial review at the Federal Court or Federal Magistrates Court. Judicial review is available only on a question of law.

2.3. If a decision of a delegate is under review, each decision maker at the Authorised Review Officer (ARO), SSAT or AAT levels stands in the position of the Secretary when reconsidering that decision on its merits. The appeals process is illustrated in **Figure 1**.

2.4. After taking into account all relevant considerations, the Department may consider that the SSAT or AAT has not reached the correct or preferable decision, and that it is appropriate to appeal in order to protect the integrity of the social security system.

Implementing a Tribunal Decision

2.5. Once the Social Security Appeals Tribunal (SSAT) makes a decision, that decision immediately becomes the operable decision². Implementing a SSAT decision that sets aside or varies a Centrelink decision about income support eligibility or payability can involve a number of consequences, including:

- making ongoing social security payments to a recipient.
- paying arrears of social security payments to a recipient.
- ceasing recovery of a debt from a recipient.

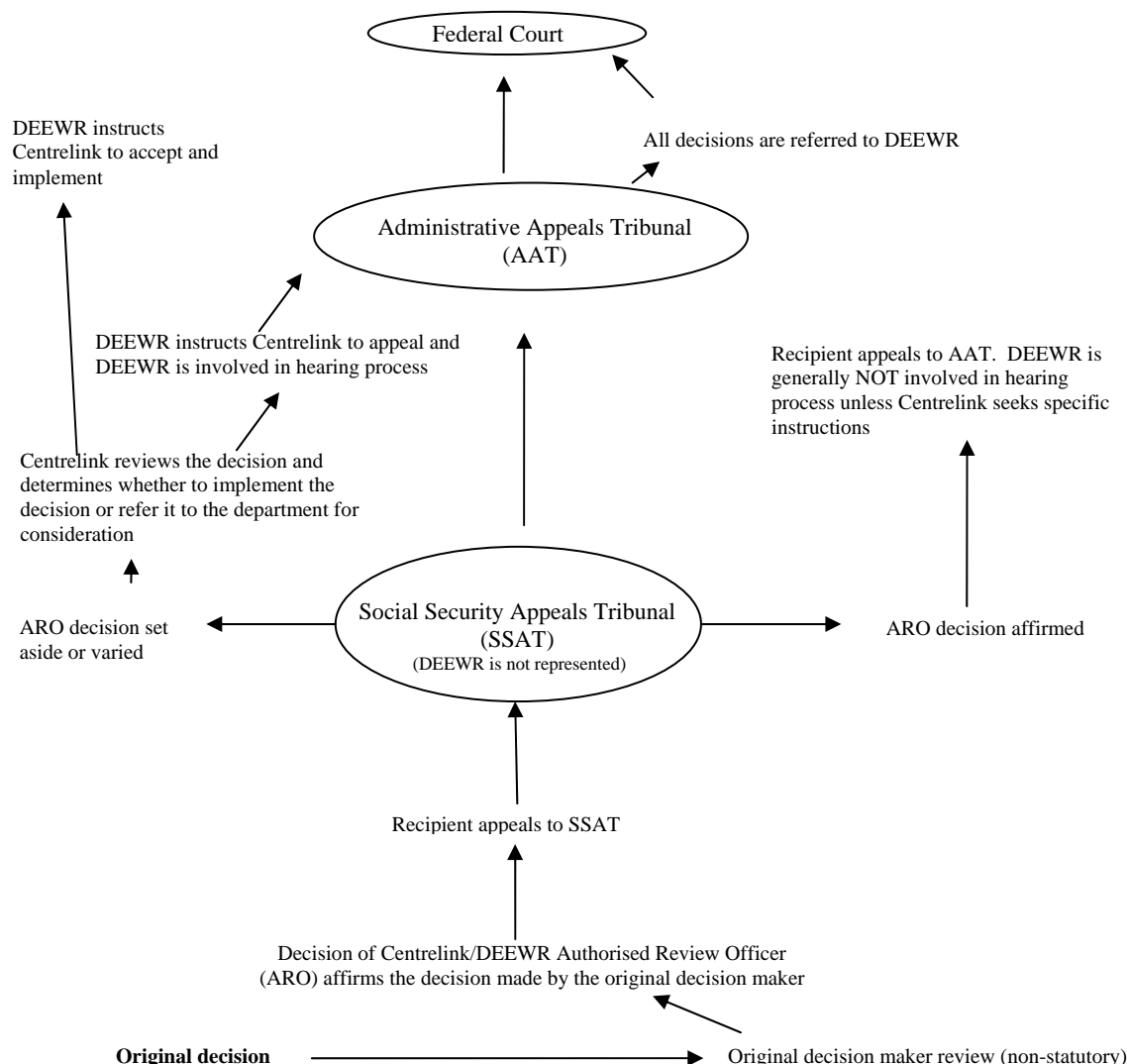
2.6. The review looked at the issue of time taken to implement a decision. A decision that finds in favour of the recipient should be implemented immediately unless the Department intends to appeal the decision, in which case the Department would determine whether to seek a stay from the AAT. In examining the issue, Centrelink clarified that it immediately commences the process of implementation of SSAT decisions but some delays can occur due to the nature and complexity of particular decisions.

2.7. Ordinarily, DEEWR will not seek a stay over a decision to prevent a recipient receiving ongoing payments. To avoid recipients incurring debts, partial stays will be sought to prevent lump sum payments of arrears being made (given the difficulties with later recovering those sums if the appeal is successful). A recipient may prefer to consent to a stay over such a decision in their favour, to prevent them later being subject to a debt.

¹ Section 8 of the Social Security (Administration) Act 1999

² Section 152 of the *Social Security (Administration) Act 1999*.

Figure 1: Social security appeals system



2.8. While implementation of a decision is largely an administrative matter for Centrelink, the review found that operable decisions should be implemented as quickly as practicable. Implementation of a decision should have regard to the consequences, e.g. incurring a debt if a recipient is back paid and the Department later successfully appeals the decision. Where recipients are in extreme hardship Centrelink will seek to ‘fast-track’ implementation of the decision or the decision to appeal. Centrelink has agreed to provide a single point of contact to facilitate fast tracking implementation when required.

Merits of appeals

2.9. The majority of social security appeals to the AAT are made by recipients, however the Department may seek to appeal in cases where the SSAT finds in favour of the recipient and sets aside or varies the Authorised Review Officer’s (ARO) decision.

2.10. As described in 2.1, the Department has certain obligations and as such may consider that appealing a decision is necessary under certain situations, for example: to maintain the integrity of the social security system.

2.11. When undertaking appeals and litigation activity, the Department is required to act as a model litigant in accordance with *Attorney - General's Legal Services Directions 2005*. While all of the obligations must be adhered to, of particular relevance to this review are the principles that the Commonwealth:

- must act consistently in handling litigation.
- keep the costs of litigation to a minimum where it is not possible to avoid litigation.
- not undertake or pursue appeals unless the Commonwealth believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.

Frequency of appeals

2.12. Criticism of DEWR's appeals and litigation activity referred to the number of departmental appeals. Of all cases in 2006-2007 where an income support recipient contested Centrelink's original decision, DEWR appealed, to the AAT in less than 1% of cases. For the sub-section of cases where the income support recipient proceeded to the SSAT, 32.5% of decisions found in favour of the recipient, were appealed by DEWR.

2.13. While these proportions are low, there were two areas where DEWR practice attracted criticism:

- that the rate of Secretary's appeals was higher than for other Departments (The comparative analysis of appeals is covered in section 3).
- that a higher proportion of Secretary's appeals were withdrawn.

Table 1: Frequency of DEWR related Decisions Appealed by DEWR Secretary

| | Total Number of Contested ODM Decisions | Total Number of SSAT Appeals | Number of Decisions Set Aside at SSAT | Number of Decisions Appealed by DEWR Secretary | % of Set Aside Decisions Appealed | % of Total SSAT Decisions Appealed | % of Total Contested ODM Decisions Appealed by Secretary |
|--------------|---|------------------------------|---------------------------------------|--|-----------------------------------|------------------------------------|--|
| 2006 | 86456 | 4645 | 1153 | 375 | 32.5% | 8.1% | 0.43% |
| 2007 | 88154 | 5111 | 1061 | 270 | 25.4% | 5.3% | 0.31% |
| Total | 174610 | 9756 | 2214 | 645 | 29.1% | 6.6% | 0.37% |

Data source: Centrelink Management Information System (Cognos)

Outcome of DEWR Secretary appeals to the AAT

2.14. The outcomes of Secretary appeals for the 2006 -07 period were analysed to assess whether the appeals were warranted³. Of the 321 applications finalised for which the former Secretary of DEWR was the applicant in 202 (or 62.9%) matters the application was withdrawn. Details of the outcomes of all Secretary appeals to the AAT are provided at **Appendix B**.

2.15. The data show that the decisions under review were varied or set aside, by the decision of the AAT or by agreement, in 22% of cases.

³ Appeals matters finalised in 2005-06 were not considered as these would have been cases commenced by FaCS because of the length of time taken to finalise matters.

2.16. In cases in which the DEWR Secretary did not withdraw the appeal before the AAT ruled, decisions under review were varied by decision or agreement in 6% of cases, set aside by decision or agreement in 54.6% of cases and affirmed by decision or agreement in 27% of cases.

2.17. The large number of appeals that were withdrawn is of concern because a case that is appealed and later withdrawn suggests that:

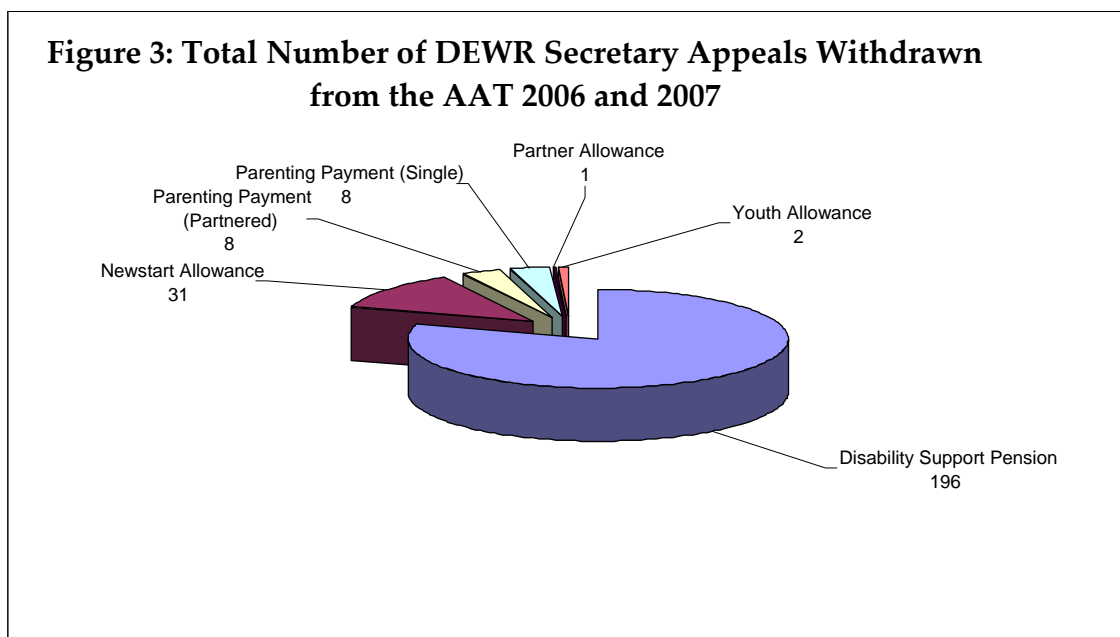
- the correct decision was made at the lower level of appeal (in this case at the SSAT).
- the appeal has caused uncertainty for the recipient.
- the appeal and subsequent withdrawal may not be the most efficient use of resources.

Withdrawn Appeals

2.18. The appeals withdrawn by DEWR were primarily matters related to Disability Support Pension (DSP) (see Figure 3). Over the period 2006 and 2007, 196 (representing 80%) of DEWR Secretary appeals later withdrawn from the AAT were DSP cases. The next highest category by payment type was Newstart Allowance (NSA). Over the two year period there were only 31 NSA cases withdrawn (13% of total withdrawn cases).

2.19. The reasons that DEWR had originally appealed the DSP cases related to the claimant's eligibility for DSP and was usually on the basis of whether the claimant's:

- impairment rating met the required 20 points on the Impairment Tables, or
- incapacity for work was temporary rather than permanent (more than 2 years).



Data source: Centrelink Management Information System (Cognos)

Withdrawn Disability Support Pension Appeals

2.20. In respect of the 196 DSP cases withdrawn from the AAT in 2006 and 2007, the original reasons for appeal were largely related to confirming a claimant's eligibility for DSP payment.

2.21. The reason for withdrawing an appeal is not recorded in Centrelink's database. Therefore a sample of cases was analysed as part of the review to determine the reason for withdrawing DSP appeals. This analysis finds that of the 18 cases withdrawn in the three month period

December 2007 to February 2008⁴, the most common reason for DEWR appealing was that the documentary evidence in the form of medical reports and Job Capacity Assessment reports did not appear to DEWR to support the decision of the SSAT that the recipient was qualified for DSP.

2.22. In the same sample of cases, the reason for withdrawal of the AAT appeal in all but one case, was that new evidence obtained from medical practitioners and/or Job Capacity Assessors (JCAs) indicated that the recipient was (at least from that point in time) qualified for DSP.

2.23. By way of background, in 2006 new policy had been introduced which used JCAs as the primary mechanism for assessing a person's eligibility for DSP. This policy recognised that JCAs have the necessary expertise to evaluate medical evidence in the context of a person's work capacity and to assess the effect that the person's disability or illness will have on their current and long term capacity for work.

2.24. The appeals and subsequent withdrawal of many appeals, reflects the action the Department took to support implementation of the policy. Some possible improvements in the role of JCAs are at paragraphs 4.8 onwards.

2.25. In Summary, the Department in meeting its obligations under the social security legislation may at times consider it necessary to appeal the decision of a tribunal. Appeals by the Secretary must comply with the *Legal Services Directions 2005*. Whilst, the number of appeals in the former Department did increase, the majority of SSAT decisions that set aside Centrelink's decision, i.e. found in favour of the recipient were left undisturbed by the Department. Where the Secretary did appeal matters to the AAT the outcome of those appeals shows that a large proportion were subsequently withdrawn, indicating inefficiencies in the appeal process. The withdrawn appeals primarily involved DSP claims, which were initially appealed on the basis of insufficient evidence to support the claim and later withdrawn following the provision of new medical or work capacity evidence to support the claim.

⁴ DEEWR continued to manage DSP appeals during this period, prior to transition of DSP to FAHCSIA.

3. The Appeals Process in other Government Organisations

3.1. This review has sought to draw on the experience of other Commonwealth organisations to identify the process and procedures used in those departments and determine the extent to which these can serve as best practice for DEEWR.

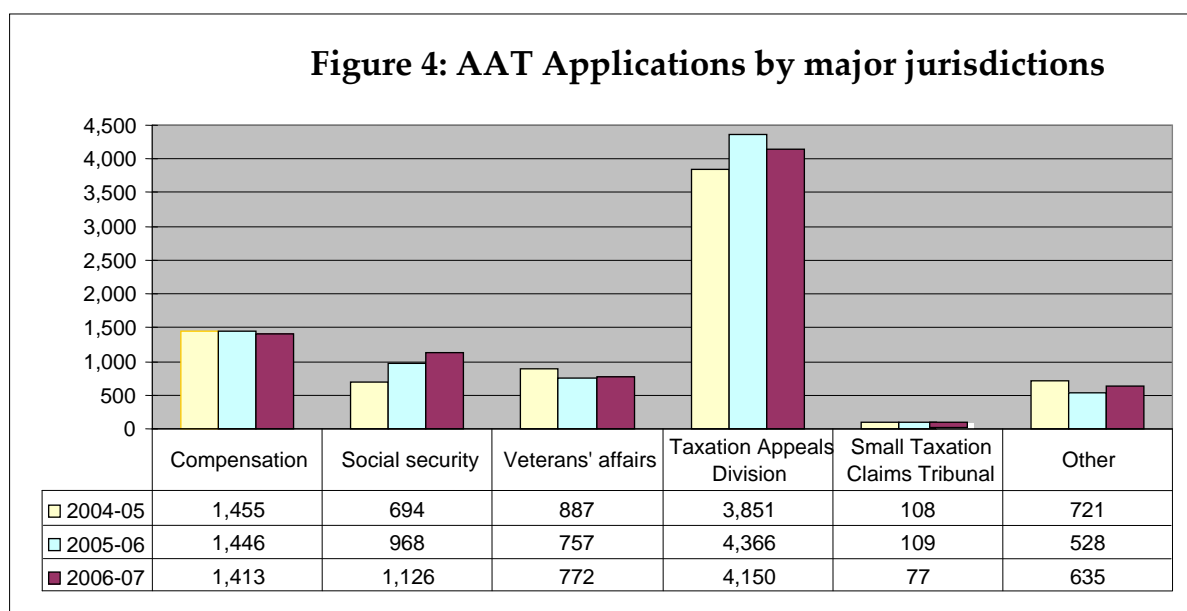
3.2. The following departments and agencies were consulted:

- Department of Families, Housing Community Services and Indigenous Affairs (FaHCSIA).
- Department of Veterans' Affairs (DVA).
- Department of Immigration and Citizenship (DIAC).
- the Australian Taxation Office (ATO).
- Comcare.

3.3. These discussions focused on the issues faced in appeals-related decision making and, in particular, the factors that are taken into consideration in determining whether to appeal and whether some factors take priority over others. The consultation also explored the broader issues of management of policy issues arising from appeals and litigation as well as administration of litigation matters. This included looking at how the agency addresses policy and operational issues that are identified through litigation matters, the feedback mechanism to policy and program areas and how the organisation is assured that the conduct of litigation meets the organisation's required standards.

Number of AAT appeals in other Government organisations

3.4. The number of AAT appeals by major jurisdictions is set out below. These data include both recipient and Secretary appeals. As can be seen from figure 4, taxation and compensation related appeals represent the highest number of appeals to the AAT. It should be kept in mind that the AAT is the first level of external review for these matters, unlike the social security jurisdiction which has the SSAT as a prior level of external review.



Source: Administrative Appeals Tribunal 2006 – 07 Annual Report

3.5. Comparing the number of Secretary appeals in DEWR with the other social security policy Departments of (former) FaCSIA and (former) DEST shows the proportion of Secretary Appeals was higher in DEWR in both 2006 and 2007 -see **Table 2**.

Table 2: Social security appeals in the Administrative Appeals Tribunal and the Federal Court – 2005 - 06 – 2006 - 07

| 2005-06 | | Administrative Appeals Tribunal | | | | | | Federal Court of Australia | | | | | |
|---------|-------------------|---------------------------------|-----|------------|-----|-------|------|----------------------------|-----|------------|-----|-------|------|
| DEWR | | Recipient | | Department | | Total | | Recipient | | Department | | Total | |
| | 2005-2006 | 964 | 82% | 212 | 18% | 1176 | 100% | 10 | 59% | 7 | 41% | 17 | 100% |
| | % of total | | | | | | | 71% | | 87.5% | | 77% | |
| DEST | | Recipient | | Department | | Total | | Recipient | | Department | | Total | |
| | 2005-2006 | 83 | 94% | 5 | 6% | 88 | 100% | 0 | - | 0 | - | 0 | - |
| | % of total | | | | | | | - | | - | | - | |
| FaCSIA | | Recipient | | Department | | Total | | Recipient | | Department | | Total | |
| | 2005-2006 | 509 | 92% | 44 | 8% | 553 | 100% | 4 | 80% | 1 | 20% | 5 | 100% |
| | % of total | | | | | | | 29% | | 12.5% | | 23% | |

| | | Administrative Appeals Tribunal | | | | | | Federal Court of Australia | | | | | |
|--------|-------------------|---------------------------------|-----|------------|-----|-------|------|----------------------------|-----|------------|-----|-------|------|
| DEWR | | Recipient | | Department | | Total | | Recipient | | Department | | Total | |
| | 2006-2007 | 970 | 72% | 376 | 28% | 1346 | 100% | 14 | 67% | 7 | 33% | 21 | 100% |
| | % of total | | | | | | | | | | | | |
| DEST | | Recipient | | Department | | Total | | Recipient | | Department | | Total | |
| | 2006-2007 | 93 | 87% | 14 | 13% | 107 | 100% | 0 | - | 0 | - | 0 | - |
| | % of total | | | | | | | | | | | | |
| FaCSIA | | Recipient | | Department | | Total | | Recipient | | Department | | Total | |
| | 2006-2007 | 631 | 88% | 84 | 12% | 715 | 100% | 6 | 60% | 4 | 40% | 10 | 100% |
| | | | | | | | | | | | | | |

Source: 1/7/2005 – 30/6/07 Data from Centrelink Appeals Cube

3.6. The reason for comparatively higher appeals in DEWR in 2005 - 2006 and 2006 – 2007 may relate to the types of payments for which DEWR had responsibility. For example, the data show that the highest number of appeals by payment type to the SSAT and AAT are Disability Support Pension (DSP) and Newstart Allowance both of which were managed by DEWR during this period.

3.7. The period during which the higher appeal rate in DEWR occurred correlates with the transition to and commencement of 'Welfare to Work'. This legislation increased the participation obligations on people in receipt of working age payments and from 1 July 2006 established new eligibility requirements for DSP.

3.8. It is probable that the higher rate of appeals is at least in some part related to the bedding down of new policy.

Management of Appeals

3.9. One of the main differences in management of appeals across agencies is the appeals structure. Some jurisdictions provide an additional level of informal, independent, no cost, merits review prior to the AAT which is similar to the SSAT. For example:

- Decisions made by DVA under the *Veteran's Entitlement Act 1986* and the *Military Rehabilitation and Compensation Act 2004* can be reviewed by the Veterans' Review Board.
- DIAC has a Merits Review Tribunal which reviews decisions made by the Department in relation to Visas and refugee status.

3.10. In agencies such as the ATO and Comcare, the AAT is the first level of external review for the client. For example, taxpayers who dispute an ATO decision can raise concerns with the ATO to review for errors etc but a formal objection is made to the AAT or Federal Court.

3.11. All of the agencies reported having a process for making appeal determinations which incorporates input from their legal, policy and service delivery/business areas to examine the issues of the case and provide a recommendation to appeal or not. The main point of difference was the degree of formality. For example, in some departments the process occurs on an informal, needs basis. Others such as the ATO and Comcare, reported formal structures and detailed policies and procedures to manage appeals.

Key factors in decision making

3.12. Common themes emerged in relation to the factors that are considered in determining whether or not to appeal a decision. These included:

- Reference to being guided by the *Legal Services Directions 2005* and the model litigant obligations.⁵
- Public interest - agencies referred to appealing a case if it was in the public interest to do so. This usually includes consideration of broader cost and precedent issues of the case.
- Point of law – the extent to which matters are appealed on the basis of a point of law varied. For example, depending on the implications of the error, some agencies reported a preference to raise a point of law error with the tribunal on an informal basis rather than contesting the decision. However, if after discussion there was continuing disagreement, the decision may

⁵ Note the remaining factors are within the ambit of the *Legal Services Directions 2005* but are included to show the agencies' emphasis on implementing the Directions.

be appealed for the purpose of clarification. This would particularly occur if the decision had broader policy and operational implications or in the case of clarifying new legislation.

- Protecting the integrity of the system and government policy – agencies agreed that this would be a basis for appealing cases particularly if the implications of broad application of the decision was to incur significant costs and new obligations on government which were inconsistent with government policy.
- Cost considerations were a major factor for most agencies. However, the ATO reported its litigation activity as principle not cost based. The primary focus for this agency is consistency in administration of the law and protecting the integrity of the system. The ATO considers that recourse to the Courts and Tribunals provides final, fair and independent resolution of disputes, and in some cases achieves clarification of law which benefits the Government and the community. To support this position the ATO has a public interest Test Case Litigation Program through which taxpayers can be provided with financial support, as appropriate, to achieve clarification of the law.

4. Lessons Learned

Addressing the number of appeals

4.1. The data suggests that the level of appeal activity within the former Department was higher than that for other social security policy departments. There was an increase in the level of appeals. It has also been noted that the level of appeal needs to be considered in the context of the types of payments managed by the Department at the time, the total number of disputed decisions in Centrelink for these payments, and the context of 'bedding down' new legislation, policy and procedures.

4.2. Nevertheless, based on the practice within other government departments, it would be possible for DEEWR to more often use alternatives to appeals, particularly in matters where the outcome of the decision has limited consequences for the broader administration of the social security system.

4.3. Some of the submissions to the review considered that the higher level of appeals in the former DEWR may reflect that the Department:

- did not fully acknowledge the role of the tribunals in determining cases on the facts of the matter and the discretion that the tribunals can exercise in relation to individual cases;
- effectively protected the integrity of the social security system but had not fully considered the circumstances of income support recipients and their families.

4.4. It was noted that the number of appeals could be reduced by the Department recognising the role of the tribunals and giving due regard to the benefit the tribunal has had in receiving evidence from recipients/claimants in person and by achieving the right balance between consideration of a recipient's circumstances against the Department's responsibility to ensure the integrity of the social security system.

4.5. Based on these findings it is important that the Principles highlight that decision makers are to:

- recognise the role of tribunals and give regard to the benefit the tribunal has had in receiving evidence from the recipient.
- consider the likely effect of an appeal on the income support recipient and their family.
- consider the alternatives to appeals and legal proceedings that could more efficiently resolve the dispute.

As a result, these issues are addressed in the Principles (see Appendix C).

Addressing the number of withdrawn appeals

4.6. One of the key issues identified during the review was the number of appeals that were made and subsequently withdrawn by DEWR. These appeals which largely related to DSP claims were appealed on the basis of existing evidence being insufficient to support the claim. On consideration of further medical or work capacity evidence which supported the claim, the Department withdrew the appeal.

4.7. While it is recognised that this may be the consequence of bedding down new policy and arrangements, for example, Job Capacity Assessments for DSP eligibility, analysis has shown inefficiencies arise from appealing and then withdrawing matters, which also can cause uncertainty and anxiety for recipients.

4.8. The issues which arise from a department appealing a matter and later withdrawing the appeal could be reduced or avoided if necessary evidence could be obtained earlier in the new claim/review process. In respect of DSP, lack of access to medical specialist reports as part of the claim can block the process. This situation could be addressed through better use of the funds that are available to JCAs to refer claimants to other services including a medical specialist.

4.9. Matters relating to DSP are no longer the policy responsibility of DEEWR therefore the lessons learned in respect of DSP appeals will be passed to FAHCSIA as the department with policy responsibility for DSP payments, and to Department of Human Services as the agency responsible for policy related to Job Capacity Assessments. The finding regarding better use of DSP funds is to be referred to the government's current review of the Job Capacity Assessment Program.

Recommendation 1

The Department recommends that the Minister refer the findings of this report, in particular the matters relating to DSP appeals, to the Minister for Families Housing, Community Services and Indigenous Affairs and the Minister for Human Services. The matters relating to Job Capacity Assessors are to be referred to the current JCA review.

Conduct of Appeals

4.10. While it is somewhat outside of the scope of this review, the feedback from consultation regarding the Principles for decision makers noted that there may be a number of other ways in which the conduct of appeals could be improved by DEEWR obtaining timely and comprehensive evidence in order to more fully inform the decision to appeal and/ or make more timely decisions about withdrawing from an appeal matter due to new evidence. It was also proposed that the Principles for decision makers include detail on the Department's policy regarding payment of legal costs for recipients for matters appealed at the judicial level, management of cases outsourced to external legal providers, the circumstances under which counsel should be briefed, and timeliness and ongoing review of appeals on foot in light of new evidence.

4.11. The committee agreed that these matters would be most appropriately addressed by being referenced in the preamble to the Principles so that it is clear that the Department supports high standards in relation to litigation conducted on its behalf. In addition the Department agreed to meet with Centrelink, National Legal Aid and National Welfare Rights Network as necessary to address specific concerns about the conduct of appeals.

4.12. The preamble to the draft Principles was amended to incorporate the feedback from stakeholders (see **Appendix C**)

Recommendation 2

In order to facilitate an ongoing appraisal of the conduct of appeals, the Department will meet with Centrelink, National Legal Aid and National Welfare Rights Network as necessary to address specific concerns that may arise in relation to the conduct of a case.

Other areas for improvement

4.13. The review identified a number of other issues which, while somewhat outside the scope of this review, are relevant to improved administration of appeals and litigation arrangements.

4.14. The review has identified the importance of continuous improvements to decision making and the appeals process. The Department will, in consultation with Centrelink, seek to improve the operation of legal service cooperation between the two organisations and explore ways to incorporate feedback from appeals to improve decision making. This could assist in reducing the number of future matters that are appealed to the tribunals.

4.15. Similarly, the Department in conjunction with Centrelink will seek to clarify standards in relation to the management of cases to ensure comprehensive consideration of the factors relevant to each matter, in order to more fully inform the decision to appeal or not appeal.

4.16. The conduct of appeals has also been identified as an issue. Again, in consultation with Centrelink, the Department will implement processes for monitoring the management of appeal cases and communication mechanisms between the Department and Centrelink to ensure withdrawals are made as early as possible in the process and in the most informed manner.

4.17. The review has noted that the Principles seek to balance, what at times may be conflicting considerations. In future, if the factors involved in a potential appeal case are finely balanced against the competing principles, a recommendation will be put to the Secretary (or her delegate) for final determination on whether or not to proceed.

Recommendation 3

The Department progress work on matters as outlined in paragraphs 4.14- 4.18 which fall outside of the review but nonetheless have important broader implications for appeals and litigation activity.

5. Principles for DEEWR Appeals

Stakeholder input

5.1. Draft Principles were developed by the Steering Committee based on the lessons learned from the review, the issues raised by the steering committee, the input of stakeholder organisations and meeting the objective in the Terms of Reference to ensure future decision making in relation to litigation matters includes cost-benefit considerations.

5.2. Stakeholders' views were sought on the draft Principles. Stakeholders consulted are listed at Appendix D. Stakeholders noted that the draft Principles were broad and therefore suggestions centred on providing more specific guidance to decision makers to ensure that:

- an appeal is warranted and likely to succeed because a decision by the tribunal is either outside the scope of the proper exercise of its discretion or contained an error of law; and
- an appeal is the most effective and efficient way to proceed, taking account of the cost of appealing, the impact on the recipient and their family and the likely impact on the broader social security system.

5.3. The review has incorporated the feedback from the consultations and the lessons learned to include, in the preamble to the Principles, statements which better guide decision makers in regard to appeal decisions and the conduct of appeals.

Objective and outline of the Principles

5.4. The Principles aim to ensure that in undertaking its responsibilities related to protecting the integrity of the social security system, the Department has regard to the circumstances of the individual recipient/ claimant, recognises the role of the tribunals in undertaking merits review, avoids costly litigation, and operates in a manner that is consistent with the model litigant obligations.

5.5. The Principles seek to balance consideration of the circumstance of recipients and the impact an appeal would have on them and their family against the Department's obligations to protect the integrity of the social security system.

5.6. The four Principles are:

- **To provide for honest, transparent and fair appeal processes and practices which balance all relevant consideration and promote confidence in the system for all stakeholders**
- **To promote efficient and effective processes including time and cost considerations**
- **To ensure the Department's appeals and litigation arrangements are transparent and assist in administering the law and provide for a fair outcome**
- **To protect the integrity of the social security system.**

5.7. The final form of the Principles is at **Appendix C**. The Principles provides guidance on matters to be considered under each Principle as well as clear reference to the model litigant obligations and the considerations of the merits review process.

5.8. The Department considers that the Principles for decision making should be publicly available to ensure that the Department is accountable to stakeholders in its application of the Principles.

5.9. Given the concerns expressed by some stakeholders that the Principles may not provide enough specific guidance, the Department would benefit from the steering committee reconvening in six months to reflect on the experience of departmental appeals in that time.

Recommendations

Recommendation 4: The Department recommends that the Minister approves the Principles (as set out in full at Appendix C) to guide the decisions of the Department of Education, Employment and Workplace Relations when determining whether to appeal decisions made under the Social Security law.

Recommendation 5: That the Principles be made available to the public, through distribution to key stakeholders and provided on line. This will provide transparency in relation to the Department's arrangements, provide information to income support recipients, their advocates and other stakeholders and increase the Department's accountability in appeals matters.

Recommendation 6: That the steering committee reconvene in six months from the date of this report, to reflect on the experience of departmental appeals in that period. Any issues identified through the follow up should be referred to the Minister for Employment Participation, the Hon Brendan O'Connor MP.

6. Conclusions

6.1. This review has found that in the future the Department can be more transparent about its appeals and litigation activity and the sort of factors considered in appeal determinations. It has also found that the Department should give greater consideration to the circumstances of individual income support recipients.

6.2. One of the major lessons of this review for the Department relates to the inefficiencies that have arisen due to the appeal and subsequent withdrawing of cases. While the matters mostly related to DSP claims, the lesson is still relevant for the Department's future management of appeals.

6.3. It is expected that the Principles, particularly those that require the decision maker to recognise the role of the tribunal, seek alternatives to appeals where appropriate, and consider the impact on the recipient and their family, will assist in improving transparency, balancing the Department's approach and reducing inefficiencies in the future.

6.4. There are a number of areas that have been identified for further improvement, especially in regard to better management of disputes and appeals related processes, which the Department will continue to progress in conjunction with Centrelink.

7. Recommendations

Recommendation 1:

7.1. The Department recommends that the Minister refer the findings of this report, in particular the matters relating to DSP appeals, to the Minister for Families Housing, Community Services and Indigenous Affairs and the Minister for Human Services. The matters relating to Job Capacity Assessors are to be referred to the current JCA review.

Recommendation 2

7.2. The Department meet with Centrelink, National Legal Aid and National Welfare Rights Network as necessary to address specific concerns that may arise in relation to the conduct of a case and advise DEEWR as necessary, particularly if there is a question about whether the conduct does not adhere to the *Legal Services Directions 2005*.

Recommendation 3

7.3. The Department, in conjunction with Centrelink, progress work on matters which have important broader implications for the appeals and litigation activity as outlined in paragraphs 4.14 – 4.18.

Recommendation 4:

7.4. The Department recommends that the Minister approves the Principles to guide the decisions of the Department of Education, Employment and Workplace Relations when determining whether to appeal decisions made under the Social Security law.

Recommendation 5:

7.5. The Department recommends that the Principles are available to the public, through distribution to key stakeholders and provided on line. This provides transparency in relation to the Department's arrangements, provides information to income support recipients, their advocates and other stakeholders and increases the Department's accountability in appeals matters.

Recommendation 6:

7.6. The steering committee reconvene in six months from the date of this report, to reflect on the experience of departmental appeals in that period. Any issues identified through the follow up are to be referred to the Minister for Employment Participation, the Hon Brendan O'Connor MP.

TERMS OF REFERENCE

Background

On 10 December 2007, the Minister for Employment Participation, the Hon Brendan O'Connor MP announced a review by the Department of Education, Employment and Workplace Relations of the administration of its social security appeals and review processes.

Objective

To review the Department's administration of social security appeals to ensure the Department's litigation activity, whilst being directed to achieve outcomes that uphold the integrity of the social security system and encourage participation in education and employment related activities, nevertheless fulfil the Department's 'model litigant obligations'.

Scope

The review will examine the process and procedures for making decisions in DEEWR on social security appeals to the Administrative Appeals Tribunal (AAT) and Federal Court. In particular the review will develop principles to guide future decision making in relation to litigation matters. This would include guidance on cost-benefit considerations.

Outcomes

The review will draw on guidelines available to Government agencies, such as the Legal Services Directions and have regard to the obligations of the Secretary in relation to upholding administrative decisions and taking legal action as well as drawing on the experience of other policy departments and Commonwealth agencies e.g. the Department of Families, Housing, Community Services and Indigenous Affairs, (FaHCSIA) the Department of Immigration and Citizenship, the Department of Veterans' Affairs (DVA) and the Australian Taxation Office. The review will report on the process, procedures and outcomes of the Department's litigation activity. It will identify key issues with a view to identifying strengths of the current process and any weaknesses or gaps that need to be addressed. The department's learnings from the process will be passed on to FaHCSIA and DVA due to their similar responsibilities in managing income support payment appeals and litigation.

A report will be provided to the Minister for Employment Participation with recommendations to ensure the appeals process incorporates considerations of efficiency and effectiveness in maintaining the integrity of the Social Security law and Government policy.

Process

The review will operate under the guidance of a Steering Committee to be chaired by Ms Lisa Paul, Secretary of the Department of Education, Employment and Workplace Relations, and will include invited representatives from the Department, other Commonwealth agencies and external organisations.

Timeframe

A report will be provided to the Minister by end March 2008.

Appeals Data

Outcomes for applications finalised in 2006–07 in which the Secretary, DEWR was the applicant.

| Outcome | 2006–07 | |
|--|------------|-------------|
| | No. | % |
| Decision under review affirmed in accordance with terms of agreement lodged by the parties under section 34D or 42C | 4 | 1.2% |
| Decision under review varied in accordance with terms of agreement lodged by the parties under section 34D or 42C | 5 | 1.6% |
| Decision under review set aside in accordance with terms of agreement lodged by the parties under section 34D or 42C | 35 | 10.9% |
| Application dismissed by consent under subsection 42A(1) | 9 | 2.8% |
| Application dismissed by operation of law ⁶ | 6 | 1.9% |
| <i>By decision of the AAT under section 43 of the Administrative Appeals Tribunal Act 1975</i> | | |
| Decision under review affirmed | 28 | 8.7% |
| Decision under review varied | 2 | 0.6% |
| Decision under review set aside | 30 | 9.3% |
| <i>Other</i> | | |
| Application withdrawn by applicant | 202 | 62.9% |
| Total | 321 | 100% |

Source: Administrative Appeals Tribunal

⁶ Where applications in the social security jurisdiction relate to recovery of a debt, the parties may agree to settle the proceedings. On receipt of the agreement, the application is taken to have been dismissed: S.182 of the Social Security (Administration) Act 1999 and S.146 of the A New Tax System (Family Assistance) (Administration) Act 1999.

Principles to guide the decisions of the Department of Education, Employment and Workplace Relations ('the Department') when determining whether to appeal decisions made under the Social Security law.

These Principles will guide decision making in the Department of Education, Employment and Workplace Relations on appeals on social security matters.

These Principles aim to balance the varying priorities that arise in seeking to ensure the integrity of the social security system, and encourage participation in education and employment activities, while complying with relevant legal obligations including those under the *Attorney- General's Legal Services Directions*. This includes the model litigant obligations which are attached to this document.

In determining whether or not to appeal, the Department will consider carefully whether an appeal is warranted and likely to succeed. The Department will recognise that Tribunal appeals are determined on the merits of the case and involve the exercise of discretion. In general the Department will not seek to appeal unless there is an error of law or an important issue of principle.

In conducting appeals and litigation the Department will ensure its processes are balanced, fair and transparent; and promote confidence in the system for all stakeholders. The Department will ensure that its representatives are conscious of their role in assisting the Tribunal to make its decision and should always act in compliance with their obligations. This includes, but is not limited to: ensuring the Department does not rely on technical matters; deals with matters promptly; and does not take advantage of a recipient who lacks resources to litigate a legitimate claim.

1. Provide for honest, transparent and fair appeal processes and practices which balance all relevant considerations and promote confidence in the system for all stakeholders.

This principle requires decision makers to:

- a. familiarise themselves and act in accordance with the relevant legal obligations in relation to appeals;
- b. ensure all decisions regarding appeals comply with the *Attorney - General's Legal Services Directions 2005*, including the model litigant obligations;
- c. recognise the role of the tribunals and give due regard to the benefit the relevant Tribunal has had in receiving the evidence of recipients in person;
- d. make decisions on appeals in accordance with the highest ethical standards in a fair, transparent and sensitive manner;
- e. consider the circumstances of the income support recipient and the impact an appeal would have on them and their family; and,
- f. consider the beneficial nature of social security legislation and the impact on the income support recipient against the importance of the broader principles of social security administration and the Department's other requirements stated at principles 3 and 4.

2. Promote efficient and effective processes including time and cost considerations

This principle requires decision makers to consider:

- a. the significance of the outcomes sought and the prospects of success;
- b. the financial cost of appealing a matter against a realistic assessment of the broader financial impact on the social security system if the matter is not appealed; and,
- c. whether there are alternatives to appeal and legal proceedings that would more efficiently resolve the issue in dispute.

3. Ensure the Department's appeals and litigation arrangements are transparent and assist in administering the law and provide for a fair outcome

This principle requires decision makers to consider:

- a. whether there are sound and supportable reasons for the appeal which support that the correct or preferable decision is reached and ensure proper administration of the law and avoid unnecessary litigation;
- b. each case separately on its merits and ensure that like cases will be treated with like to promote consistency of decision making and certainty for social security recipients; and,
- c. whether the Department has consulted with other departments who may have an interest in the outcome of any appeal.

4. Protect the integrity of the social security system

This principle requires decision makers to consider:

- a. whether undertaking an appeal would be consistent with the statutory obligations of the Secretary in administering the Social Security law⁷;
- b. whether there is a significant point of law or stated Government policy which needs to be clarified or defended;
- c. whether, in each case, the appeal process is the correct mechanism for resolving the issue concerned or an alternative mechanism is preferable; and,
- d. a realistic assessment of the broader effect of leaving an inconsistent decision of a court or tribunal undisturbed and the potential for other decision makers to follow it⁸.

⁷ Refer section 8 of *The Social Security (Administration) Act 1999*

⁸ This principle recognises the fact that tribunal decisions are not binding on other tribunals but in practice may be followed in similar factual circumstances

The Commonwealth's obligation to act as a model litigant

The obligation

1. Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

2. The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

- (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
- (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
- (c) acting consistently in the handling of claims and litigation
- (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
- (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and
 - (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
- (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
- (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
- (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
- (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

NOTE 1. The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government

Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

NOTE 2. In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

NOTE 3. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

NOTE 4. The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)

NOTE 5. The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

Merits review proceedings

3. The obligation to act as a model litigant extends to agencies involved in merits review proceedings.

4. An agency should use its best endeavours to assist the tribunal to make its decision.

NOTE. The term 'litigation' is defined in paragraph 15 of these Directions in terms that encompass merits review before tribunals. There are particular obligations in relation to assisting a tribunal engaged in merits review to arrive at a decision. Agencies should pay close attention to the legislation under which a tribunal is established, and any practice directions issued by the tribunal. In the case of the Administrative Appeals Tribunal see in particular subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975* and the explanatory memorandum to the Administrative Appeals Tribunal Amendment Bill 2005.

Alternative dispute resolution

5. When participating in alternative dispute resolution, the Commonwealth and its agencies are to:

- (a) participate fully and effectively, and
- (b) wherever practicable, ensure that their representatives have authority to settle the matter, or at least clear instructions on the possible terms of settlement that would be acceptable to the Commonwealth, so as to facilitate appropriate and timely resolution of a dispute.

NOTE 1. When participating in alternative dispute resolution processes, regard is still to be had to the requirements for settling major claims under paragraph 4.4 and Appendix C of the Legal Services Directions. In practical terms, this may mean that a representative attending an alternative dispute resolution process may not be able to be given authority to settle a matter to finality. This is to be made clear to the other party when discussing the use of this process.

NOTE 2. Agencies are encouraged to develop dispute management plans addressing the place of litigation and alternative strategies in addressing disputes.

Stakeholders Consulted

Administrative Appeals Tribunal

President - Justice Garry Keith Downes AM
National Registrar - Mr Doug Humphreys

Social Security Appeals Tribunal

Executive Director - Mr Les Blacklow

Australian Council of Social Services

Executive Director - Mr Andrew Johnson

National Employment Services Association

Chair NESA Board - Mr Xavier Crimmins

National Union of Students

National President Mr Michael Nguyen

National Association of Community Legal Centres

National Convenor - Liz O'Brien

National Welfare Rights Network

National President – Mr Michael Raper

National Legal Aid

Chair - Mr Hamish Gilmore

Administrative Review Council

Executive Director – Ms Margaret Harrison- Smith

Federal Court

Registrar – Mr Philip Kellow

Department of Families, Housing Community Services and Indigenous Affairs

Secretary Dr Jeff Harmer

Department of Veteran's Affairs

Secretary - Mr Mark Sullivan AO

Australian Council of Trade Unions

Ms Sharan Burrow

Australian Chamber of Commerce and Industry

Acting CEO Peter Anderson