



NORTHERN TERRITORY OF AUSTRALIA

REMUNERATION TRIBUNAL

REPORT

AND

RECOMMENDATION No. 1 of 2005

JUDGES

REPORT

JUDGES

BACKGROUND

1. Contrary to State practice, the Northern Territory Parliament has no role in the process of setting remuneration for Judges of the Supreme Court. In the States, the Parliament either sets the remuneration itself, or has every change laid before it for approval, with accompanying commentary by the respective independent Remuneration Tribunal.
2. In the Northern Territory the Executive has the exclusive power to do so. Its only constraint is that the remuneration cannot be reduced. This power has always been exercised privately for each Judge. Interested parties, including other Judges, have no right to ascertain what a particular Judge's remuneration is. No independent advice is obtained.
3. Until 14 years ago the advice of this Tribunal was routinely sought when aspects of Judges' remuneration were being considered. As copies of all Tribunal advice are required to be tabled in Parliament, there was at least some disclosure of what was going on in those earlier times. In those last 14 years all Judges except for one have been replaced, acting Judges have come and gone, and many official and unofficial changes to remuneration components have occurred.
4. In May 2000, in the midst of local controversy over an alleged secret appointment deal with the Chief Magistrate, the Chief Minister tabled what were said to have been all Magistrates' and the Judges' Remuneration determinations.
5. The Tribunal has studied all of the remuneration determinations made in respect of Judges over the past 14 years and has formed the view that none of the new ones, or variations to the old ones, have been made or included to influence judicial behaviour.
6. Over the course of this inquiry the Government has provided the Tribunal with all pertinent records. The Tribunal met with the Chief Justice and with the head of the Department of Justice, and entered into detailed correspondence with them. Generally speaking they are each satisfied with the way remuneration is set for Judges.
7. The report and recommendations of the Inquiry follow.

INTRODUCTION

8. The quantum and rate of remuneration and allowances paid to Judges, and the extent of other benefits to which they may be entitled, is a matter for determination by the Administrator from time to time under section 41 of the *Supreme Court Act*. That section provides as follows:

"41 Remuneration

(1) A Judge shall receive –

(a) salary at a rate;

(b) such allowances and at such rates; and

(c) such other benefits,

as are determined from time to time by the Administrator.

(2) Salary to which a Judge is entitled under subsection (1) accrues from day to day and is payable monthly.

(3) The salary, allowances and other benefits to which a Judge is entitled under subsection (1) shall not be altered to his detriment during his term of office.

(4) Salaries, allowances and benefits payable under subsection (1) are to be paid from the public moneys of the Territory and the Allocation for that purpose is established or increased to the extent necessary."

For the purpose of the section, "Judge" includes the Chief Justice, an additional Judge, or an acting Judge.

9. Superannuation and Long Service leave payment entitlements of Judges are provided for in specific legislation¹.
10. At the time of this inquiry there are six Judges and four acting Judges.
11. This Tribunal is established by section 6(1) of the *Remuneration Tribunal Act*. Section 10(1) of that Act enables the Administrator to request the Tribunal to inquire into and report with recommendations on the remuneration and allowances to be paid to a person or class of persons, as well as other entitlements to be granted for their services. Tribunal reports are required to be tabled in the Legislative Assembly within 6 sitting days next following their receipt by the Administrator.
12. On 25 January 1984 the Administrator issued a formal Notice of Request to the Tribunal, specifying Judges as a class of persons to come within these arrangements and requesting the Tribunal to undertake its duties in this regard "from time to time".

¹ *Supreme Court (Judges Pensions) Act* and the *Supreme Court (Judges Long Leave Payments) Act*.

13. Within this standing authority, each inquiry and report sequence of Tribunal activity has been initiated on the written request of the Chief Minister of the Northern Territory.
14. The last full Inquiry was completed on 25 April 1991, on which date the Tribunal made its Recommendation 1 of 1991 to the Administrator.
15. The Chief Minister initiated the current sequence by letter to the Tribunal dated 29 February 2004.
16. The Tribunal has completed the Inquiry and this report and recommendation completes the review.

CURRENT REMUNERATION SETTING SYSTEM

17. In practice, the Executive, through the Administrator, determines the remuneration of each Judge by name at the time of his or her appointment, and this instrument, subject only to the amendments described in the next paragraph, persists whilst that Judge is in office. Such foundation determinations provide that whenever the salary component is set it must not be less than the salary of a Judge of the Federal Court of Australia (Federal Judge) at that time.
18. At least annually, the rates of salary are increased by separate amending determinations for the Chief Justice on the one hand and for all Judges on the other. These determinations sometimes include increases in travelling allowance rates. On rare occasions benefit entitlements for an individual Judge, or for all Judges, are extended by a subsequent special determination or as a part of a determination increasing rates of salary and travelling allowance. A recent determination contained only changes to travelling allowance.
19. Similarly, the remuneration for Acting Judges is determined personally upon commencement of their term of appointment. Appointments are commonly for 12 month periods.
20. The Executive does not obtain the advice of this Tribunal when putting these determinations to the Administrator.
21. Determinations made by the Administrator are not required to be notified, tabled or otherwise made known.
22. From time to time the scope of a Judge's determination is expanded by administrative discretion, and this has drawn critical comment from the Auditor-General.

CONVENTIONS FOR JUDICIAL REMUNERATION SETTING IN AUSTRALIA

23. The definition of remuneration varies in the States and the ACT, so there is some variation as to how the various elements of Judges' conditions of service other than salary are set, in particular the degree to which the respective Remuneration Tribunal is involved. For example:
- in NSW, the remuneration set by the Tribunal is salary, the car allowance, and the travelling allowance (and conditions attaching thereto). Other general entitlements are set by the court or by the Attorney-General;
 - in Victoria, the remuneration is just salary, and the rate thereof is set directly by Parliament. Other allowances and benefits are determined on the basis of advice of the Tribunal;
 - in Queensland the remuneration determined by the Tribunal includes only salary and fixed allowances. Travelling expenses are covered under the administrative travel procedures established by Government. General entitlements of office are set administratively from time to time;
 - in South Australia the Tribunal determines all pecuniary benefits. Other benefits are provided under administrative discretion;
 - in Western Australia the Tribunal determines salary, travelling and accommodation allowances, and motor vehicle entitlements. Other benefits are provided under administrative discretion;
 - in Tasmania remuneration is only salary and this is set under an interstate nexus provided in legislation. Other benefits are provided under administrative discretion; and
 - in the ACT salary, allowances and all other entitlements are, by legislation, the same as for a Federal Judge².
24. The remuneration of Judges in all Australian jurisdictions is determined generically and is a matter of public record. A summary of the requirements in each of the Jurisdictions is as follows:

	<u>Determined</u>	<u>Gazette</u>	<u>Tabling</u>	<u>Disallowable</u>
NSW	by Tribunal	Yes	Yes	Yes
Victoria	by Act to 1/7/07, then parity with Federal Court Judges.			
Qld.	by Tribunal		Yes	Yes
SA	by Tribunal	Yes	Yes	No

² Except for the Chief Justice, where the Remuneration Tribunal determines an allowance of office and tables that instrument.

	<u>Determined</u>	<u>Gazette</u>	<u>Tabling</u>	<u>Disallowable</u>
WA	by Tribunal		Yes	Yes
Tasmania	legislated salary nexus as the average SA/WA Judges, entitlements by various public instruments.			
ACT	nexus salary, allowances and entitlements are available through the Commonwealth Remuneration Tribunal determinations.. Pension and long service leave payments entitlements are available in Commonwealth Acts.			

25. It is possible to distil five major conventions applying to judicial remuneration setting in Australia. They are:
- (1) The remuneration of Judges is either set directly by Parliament, or can be changed only if Parliament does not disapprove³;
 - (2) Parliament has the benefit of an independent Tribunal report on any proposed changes to judicial remuneration before it considers disapproving of them;
 - (3) The remuneration of all judicial officers is set in the same Act or determination;
 - (4) Remuneration is set generically and all judicial officers within the same class have the same benefits; and
 - (5) When remuneration is altered the associated documents are conveniently and immediately available to the public.

WEAKNESS OF THE NORTHERN TERRITORY SYSTEM

26. The Commonwealth/State remuneration setting conventions are founded in the doctrine of the separation of powers, meant to guarantee the independence of the judiciary, and in good governance standards, in particular accountability.
27. The Northern Territory does not follow any of the Australian remuneration setting conventions identified by the Tribunal. This results in the Northern Territory system of judicial remuneration setting having two fundamental weaknesses. The first is that absolute discretion in remuneration setting is allowed to the Executive. The second is that there is absolute confidentiality in its operation.
28. Both weaknesses stem directly from the legislation. The result is confusion about how judicial remuneration is set, about who is involved in the process,

³ The exception is South Australia, where Determinations by its Remuneration Tribunal are final.

about what the level of remuneration is; and about how it moves. That confusion extends right up to the highest level of Government.

29. It is 14 years since the Northern Territory Legislative Assembly has seen an independent report into the remuneration of Judges. It has never had the opportunity to approve or disapprove of their remuneration, either upon their individual appointment or when changes to that package of benefits occurred. Without any reports summarising independent scrutiny, and without any prior or subsequent tabling requirement, there exists no mechanism for the determinations to be made accessible to the public.
30. The personal determinations for Judges do not create any salary nexus with Federal Judges⁴. Rather, they contain a promise not to change salary (whatever it happens to be) so that it falls below that payable to the Federal Judges. On the face of it, the Administrator has no power to fetter his discretion by including such an undertaking. The fact that he has always purported to fetter his discretion in this way is, in the view of the Tribunal, one of the features of all the current determinations that style them more as contracts between each Judge and the executive government of the day, and not determinations to be made from time to time as contemplated by the Act.
31. Until last year, the legislative provision covering the remuneration of Magistrates also allowed complete and private executive discretion in matters of remuneration. However, it had been customary that all Magistrates be covered by uniform benefits in the positions they hold via a generic determination. Also, the standing request by the Administrator for a Remuneration Tribunal review of Magistrates' remuneration (identical to that for the Judges) had been activated each year, and the resultant report and recommendations had always been tabled in the Legislative Assembly before changes to the generic determination were made. Whilst amended determinations were never published, there was a degree of confidence that no changes that were contrary to the recommendations of the Tribunal would be made to it, because if they were the Tribunal would comment on this during the next inquiry round.
32. However, vocal controversy arose after the Administrator, without a Tribunal report (as was his right), determined the remuneration of the Chief Magistrate, effective for two years, upon a new appointment to that position in March 2000. The non-disclosure of this instrument contributed to speculation, when its existence came to light, that the incumbent could be compliant with the Government.
33. Non-disclosure of this remuneration determination was the topic of an ABC 7.30 Report program item on 20 March 2000, where the appointment was referred to as a secret deal. The reporter said that the issue was raised as one involving the independence of the Judiciary at a meeting of the Judicial Conference of Australia. The reporter also claimed that the learned Chairman of that meeting said that "special remuneration packages can lead to perceptions that a judicial officer is beholden to government".

⁴ See paragraph 43 below.

34. The Law Society Northern Territory called for the Chief Minister to release details of the remuneration package. A challenge to the appointment was commenced in the Supreme Court in April 2000 by the North Australian Aboriginal Legal Aid Service and found its way right through Australia's courts system.

35. On 5 May 2000 the ABC reported as follows:

"The Northern Territory's former attorney-general, Shane Stone, claims most of the Territory's Supreme Court Judges receive special benefit packages from the NT Government.

A special remuneration package is at the centre of a legal challenge to the appointment of the Territory's Chief Magistrate, Hugh Bradley.

However, part of the alleged perception-of-bias case against Mr Bradley is that details of his package were not on the public record.

Mr Stone says criticism on that count is unfair because most of the Supreme Court Judges get extra benefits such as cars, home help or superannuation differentials, and those extras are not on the public record.

The Judge's pay is determined by the Federal Remuneration Tribunal, but no determinations relating to the conditions of their employment have been tabled in the Territory Parliament.

The government says they do not have to be."

36. Intense media attention focussed on the issue. Questions about this, and about the failure of the Government to table any determinations for ten years, were then asked in the Legislative Assembly.

37. On 17 May 2000 the Chief Minister tabled current determinations of the remuneration of Judges and Magistrates, with the following statement.

"Mr Speaker, I seek to provide an answer to the member for Nhulunbuy's question of 9 May.

The member in that question cast a slur on the whole of the judiciary in the Northern Territory. It was a disgraceful tactic, but one we are getting increasingly used to from the Deputy Leader of the Opposition. He is not interested, in the least bit, in the reputations of Territorians if he can score a few cheap points. He is not interested, in the least bit, that his actions belie the good men and women of our judicial system. He is not interested in any damage he does as long as he gets the media headlines. These are tactics to be deplored and condemned.

Last week in casting doubt on the independence and impartiality of the judiciary, the member for Nhulunbuy sought details of judges remuneration, allowances and other benefits for the past 10 years and magistrates for the

past 2 years. I table those documents.

I point out that Remuneration Tribunal decisions on magistrates are regularly tabled in this parliament. Since 1991, the judges of the Northern Territory Supreme Court have been tied to the Commonwealth Remuneration Tribunal's recommendations relating to Federal Court Judges and these recommendations are regularly tabled in the Federal Parliament.

As with all jurisdictions in Australia there are other benefits relating to a judge's total package. These can be determined by the government when they are appointed or by the relevant Chief Justice or Chief Judge. These are not, as a matter of course, tabled in the parliament, nor is there any requirement to do so. In tabling these documents today, I want to make it clear that this government in no way condones the attack on the integrity of the judges and magistrates of the Territory, and nor do we in any way go along with the outrageous suggestion of the Labor Party that any of the benefits or conditions awarded to judges or magistrates can be construed to be in order to gain influence. This government has total confidence in the integrity and honesty of the judiciary and rejects any suggestion to the contrary. It is unfortunate that the cheap political tactics of those opposite have made these comments necessary."

38. Contrary to this statement, the determinations covering the salary and allowances actually paid to Judges were not tabled. Nor was there any admission that all Judges receive remuneration in addition to what the Administrator has determined, and that two Judges were not getting the remuneration that the tabled document provided for them.
39. Parliament has since amended the *Magistrates Act* and the *Remuneration Tribunal Act* so that this Tribunal, rather than the Administrator, will henceforth determine the remuneration of Magistrates. These changes came into effect on 20 October 2004. Determinations made by this Tribunal must be tabled in the Legislative Assembly and will be subject to disallowance. Thus all future determinations for Magistrates (except those for acting Magistrates and relieving Magistrates) will be public documents.
40. Both of the above statements were prompted after the integrity of the judiciary had been impugned. The ABC item reports the erroneous belief held by a former Chief Minister and Attorney-General that the salary of Judges is determined by the Commonwealth Remuneration Tribunal. The Chief Minister of the day exhibited the same erroneous belief. Adding to this confusion is a view within Government itself that the Northern Territory Remuneration Tribunal has determined that the salary and allowances of Judges won't be less than those payable to Federal Judges⁵. This is not so. This Tribunal has never determined the salary of any Judge. Many years ago the Tribunal did recommend to the Administrator that parity be applied (the Tribunal remains of that view this year).

⁵ Department of Justice comment on page 30 of the Auditor-General's February 2002 Report.

41. The fact that the Government has the power to table selected determinations at any time cannot be the foundation of an open and accountable remuneration system. No determination made since the partial 2000 bulk tabling has been made public. Two new Judges and three acting Judges have been appointed since then (and some acting Judges have come and gone), and numerous salary and allowance movements have occurred.
42. In the Commonwealth, the States and the ACT, potential and new appointees have no need to look further than the legislation and generic instruments of remuneration determination to see the benefits they are to get in the position.
43. When a new Judge or acting Judge is appointed in the Northern Territory, the appointee has no legal certainty as to his or her remuneration, as the Administrator may determine it to be below, at, or above the remuneration on the day for existing Judges or acting Judges. The only certainty the appointee has is that the benefits set, whatever they are, will not move detrimentally in the future. Salary does not have to move in line with increases in the salary of Federal Judges or Judges of any other jurisdiction. Under the personal appointments system now operating under the Act, a new Judge or acting Judge could be appointed with a salary that was very different to that paid to other Judges or acting Judges, and that salary could subsequently be increased at a rate that was quite different to that applied to other Judges or acting Judges. No-one can find out about it.

REVIEW OF THE REMUNERATION SYSTEM ITSELF

44. The Chief Justice wrote to the Tribunal as follows:

"It is the view of the Judges that the remuneration setting for each Judge is open and transparent. As I indicated in previous correspondence, as longer serving Judges retire differences in benefits will disappear. The Judges believe that the current arrangements are working satisfactorily."
45. The Chief Justice told the Tribunal that he had no objection to determinations of remuneration being tabled in the Assembly from time to time.
46. However, tabling would not disclose those benefits that have been extended to Judges outside of the determinations or those that have been swapped as an unofficial amendment of them.
47. After the Tribunal wrote to the Chief Justice and to the Department of Justice on 28 May 2004, expressing its view that the remuneration legislation and determinations should be construed strictly, the Chief Justice said that he would meet with the Department to identify matters of concern that should be included in amended determinations.
48. The Department's main submission, made on 3 February 2005, incorporated the results of this meeting, and revealed its views as to the way uncertainties

should be removed. The submission reveals the following view as to how remuneration setting should proceed:

- (1) Amend each personal determination to:
 - remove any need for Tribunal advice on salary setting;
 - clarify the newspaper/periodicals entitlement;
 - introduce a "swap benefits at no extra cost" discretion;
 - allow choice of any capital city for the airfare benefit.
- (2) Make a new determination covering all Judges to legitimise:
 - seven weeks annual leave;
 - family drivers for official cars and private use rights;
 - the right to domestic help where currently provided.

49. As to the future involvement of the Remuneration Tribunal, the Department of Justice submits:

"The issue has arisen as to whether the Remuneration (Tribunal) should be responsible for determining Judges' entitlements with no involvement on the part of the Executive or the Administrator. The Judges have expressed the view they consider the current arrangement more suitable and are concerned that if it were left entirely to the Tribunal they would be required to regularly make submissions to the Tribunal on terms and conditions of office every time the Tribunal considers a pay rise for example. They consider this would be onerous and unnecessary. In fact the Judges do not see the involvement of the Tribunal as being necessary at all."

50. And:

"Most of the issues that have been raised to date could be effectively dealt with if (our proposal that variations could be made administratively if for similar purpose and at no additional cost to Government) is implemented. Accordingly, it is submitted that the status quo be maintained in respect of the involvement of the Remuneration Tribunal and that the Government refers matters to the Remuneration Tribunal from time to time, as required."

51. The Tribunal view is that retention of the remuneration setting status quo, with or without further administrative discretion, or issue specific advice from the Tribunal, or occasional tabling of instruments, is incompatible with good governance and at least potentially prejudicial to the interests of individual Judges and the good reputation of the court. It is proper for this Tribunal to recommend that the Territory adopt an accountable and State-like judicial remuneration system for the Territory.

52. However, it is not possible to introduce all elements of such change without legislative amendment, so the Tribunal also recommends that the change should be implemented progressively, as follows:
- (a) an undertaking by the Minister that changes to Judges' benefits will not occur without prior advice from the independent Remuneration Tribunal. The existing requirement that reports of the Tribunal must be tabled will ensure that Parliament, and through it the public, is aware of the issues at hand and of any recommendations made.
 - (b) an undertaking by the Minister that every determination of benefits will be tabled in the House within six sitting days of it being made. There is no legal requirement that determinations be tabled, so this will allow Parliament to see whether recommendations by the Tribunal have been followed. It will not give the Parliament the right to disapprove of any benefit changes.
 - (c) the Administrator should then make a generic determination containing all Judges' benefits. For the first time all benefits will be available for scrutiny in the one document. The new determination should contain benefits recommended in this report. Those recommendations contain protection of unique benefits now available to some Judges and are made on the basis that no detriment occurs.
 - (d) the *Supreme Court Act* and the *Remuneration Tribunal Act* should then be amended, in the same manner as recent changes covering the remuneration of Magistrates, so that future determinations of remuneration for Judges are made by the Remuneration Tribunal. This will introduce a formal separation of powers, and ensure that the Parliament has the right to disallow changes to benefits (the result of disallowance being the resurrection of the pre-existing benefit).
 - (e) at the same time the *Supreme Court Act* should be amended to tie both Judges' salaries and locality rates of travelling allowance payable to Judges (including discounts where some travel costs are met by others) to the respective salary and the rates payable to Federal Judges, with the salary of the Chief Justice being the same as that of the Chief Justice of the Federal court.

REVIEW OF SPECIFIC BENEFITS

SALARY AND SITTING FEES

53. In what has become a matter of routine executive practice, the salary of Northern Territory Judges is re-determined by the Administrator each year to be the same rate as that of their Federal Court counterparts⁶. Each increase has been backdated to the date of effect of the change applied in the Federal jurisdiction.

⁶ These salary rates are available on the website of the Commonwealth Remuneration Tribunal.

54. For many years it was necessary in the attraction of Judges for the Government to provide a residence and domestic help for the family in Darwin. Only one serving Judge still has the residence entitlement. All Northern Territory Judges still have holiday airfare entitlements and certain other benefits not shared by the Federal Judges.
55. Since then, population increase in Darwin and improvements in transport have seen the cost of living in the Territory fall very consistently relative to that cost elsewhere in Australia. If the Territory had a State-like remuneration system the salary of its Judges could have fallen behind that of the Federal Judges in recognition of these differentials. The Administrator has the power (at least in the view of the Tribunal) to grant salary increases that are less than those granted from time to time to Federal Judges.
56. It may, of course, be argued that the Administrator's discretion has already been lawfully fettered by the "no less than Federal" clause in all personal determinations. However, some of those determinations also promise to secure the advice of the Northern Territory Remuneration Tribunal before making a salary or travelling allowance determination, and the fact that this step is being ignored has not drawn any comment.
57. This Tribunal subscribes to the view that the wind-back of such benefits as housing for new Judges is compensated for by the advantage of having no regard paid to progressively lower relative cost of living in Darwin.
58. As in the States, Northern Territory Judges preside in a judicial environment into which many elements of the Federal jurisdiction are extended. They are appointed on the basis of their having the same qualities as those Federal counterparts, and they are drawn from the same market of aspirants. A current comparison of the salary paid to Judges is as follows:

	Date Effective	Annual Amount
Federal	1-07-04	\$282,470
New South Wales	1-10-04	\$282,475
Victoria	1-07-04	\$241,000
Queensland	1-07-03	\$267,491
South Australia	1-11-04	\$281,620
Western Australia	1-01-05	\$288,962
Tasmania	1-07-04	\$264,549
Australian Capital Territory	1-11-04	\$282,470
Northern Territory	1-07-04	\$282,470 ⁷

59. As the relative cost of living differentials have narrowed, and with Victoria already firmly committed to Federal parity, the creation of a firm salary nexus between Territory Judges and Federal Judges is warranted and recommended. Current public confusion, and risk, will be eliminated.

⁷ \$283,430 for those Judges entitled to the Northern Territory Allowance.

60. The level of sitting fees payable to acting Judges is determined for each of them as a straight pro-rating of the salary of a Judge. The Tribunal recommends that this fee be generically determined at that rate.

ALLOWANCES

Travelling allowance

61. The personal determinations made for Judges provide that:
- (a) travelling allowance will be paid for: periods on duty in the Territory but outside Darwin; periods out of the Northern Territory on invitation to certain functions; and for periods spent attending certain conventions and conferences;
- (b) the rate at which travelling allowance is paid is not to be less than that paid at the time to Federal Judges.
62. When this Inquiry was called, the primary determination covering the rates at which travelling allowance is to be paid had been effective since 30 November 1995, though daily rates were increased once from 1 January 2000. In 2004 those rates were different to those payable to Federal Judges under the Determination by the Commonwealth Remuneration Tribunal (CRT). Comparisons are as follows:

Location	Daily Rate	
	NT	Federal ⁸
Sydney	\$350	\$370
Other Capital City	\$320	\$300 - \$370
Elsewhere	\$200	\$196 - \$466

63. Some rates had been lower than the Federal rates for four years, contrary to the personal determinations. No determinations sequence akin to those that keep salary the same as the Federal Judges has been in place. Travelling allowance rates for Judges, and conditions attaching thereto, are not tabled in the Assembly or otherwise made available to the public.
64. On 9 December 2004 new travelling allowance rates for Judges were determined and backdated to 28 March 2004, the date of application of the then Federal rates, and some rates alignment was re-established.
65. Federal travelling allowance rates were varied again on 29 August 2004. Some locality rates were reduced. On 14 March, 2005 the Northern Territory rates were changed again, backdated to 29 August 2004. This time parity was not achieved, presumably because of a view that the legislated

⁸ Commonwealth Remuneration Tribunal Determination 2004/03 as it stood on 28 March 2004.

no-detriment mandate applied, as some of these (still current) locality rates now exceed the comparable Federal rates, for example:

Location	Daily Rate	
	NT	Federal
Brisbane or Perth	\$370	\$325

(Also the daily rate for Yulara was dropped recently by the CRT from \$466 to \$211, but, as this happened because the resort did not return its survey material to the CRT, this Tribunal recommends that the pre-existing rate continue).

66. Travelling allowance rates for members of the Federal judiciary are determined by the CRT following periodic cost reviews covering accommodation and eating establishments across Australia, and after taking account of views expressed by interested parties. They are set on the express basis that office holders are not expected to gain or lose financially as a result of travelling on official business. With this same objective, each CRT determination specifies that the allowance:
- is reduced to one third where private accommodation is used;
 - in the case where accommodation is to be provided by someone else, the allowance is only the aggregate of determined rates for meals and incidentals;
 - in the case where any meals are to be provided by someone else, the allowance is reduced by the rate determined for the respective meal(s); and
 - is not payable where travel on official business does not require an overnight absence.
67. There is an essential interrelationship between this process and the requirements of the Commonwealth Commissioner for Taxation.
68. The Commissioner has ruled⁹ that so long as travelling allowance paid to office holders does not exceed the rates determined by the Remuneration Tribunal, the allowances paid do not have to be shown as assessable income on the recipient's Group Certificate. This means that the associated expenditure on accommodation, meals and incidentals does not have to be substantiated by production of receipts at audit (though evidence of the actual travel may have to be provided in the form of diary entries or other means). Where a meal or other allowance is provided for travel when there is no overnight stay involved, the amount has to be included on the Group Certificate and expenditure must be able to be substantiated for the associated deduction to apply.

⁹ Tax Ruling TR 2003/07

69. By the very nature and purpose of these arrangements, travelling allowance rates for particular destinations will occasionally decline. The Tribunal is aware that representation was made to the Government on behalf of Judges some years ago that no reduction in a rate of travelling allowance was acceptable.
70. The Australian Constitution provides that the remuneration of members of the Federal judiciary "shall not be diminished during their continuance in office". However, the CRT can not regard travelling allowance as remuneration and is not influenced by this injunction when it sets rates¹⁰.
71. In the Northern Territory, remuneration can not be altered to the detriment of a Judge. Remuneration includes salary, allowances and all other benefits.
72. The pertinent question is whether or not remuneration is diminished, or altered to the Judge's detriment, when an allowance, set in a floating manner so that there is always no loss or gain by the Judge, falls in money terms. In the view of the Commonwealth Government (in not disallowing the determinations concerned) it is not.
73. This Tribunal does not accept that reduction in an allowance rate to match the same reduction in the costs that the allowance is provided to cover can be detrimental to the recipient.
74. In fact it may be detrimental to a Judge for the rate of travelling allowance to be left stranded at a higher level than the Federal rate.
75. Some States, and the ACT, set travelling allowance rates with regard to the CRT rates and conditions, or by a nexus to them, and the associated payments and conditions fit comfortably within the Commissioner's ruling about substantiation¹¹.
76. The Territory could conduct its own reviews of accommodation and meal costs for centres likely to be destinations of Judges on official business. Such rates could then be used instead of those determined by the CRT and these may be acceptable to the Commissioner. For example, an application was made to the Commissioner for Taxation for a ruling on whether travel allowance rates determined by the Statutory and Other Offices Remuneration Tribunal in NSW in 2002 were reasonable for the purposes of the exception from substantiation. The Commissioner ruled¹² that they were, on the grounds that the guiding principles used were substantially the same as those used by the CTR, in that:
- office holders are not expected to gain or lose financially as a result of travelling on official business;

¹⁰ By its constituting Act, under which remuneration includes only annual allowances.

¹¹ See paragraphs 77 – 80 of TR 2003/7

¹² Class Ruling CR 2002/75 and addendum CR 2002/75A

- the allowance rates are reduced to one third of the applicable rate when non-commercial accommodation is used;

and that they are subject to the condition that any allowance given when sleeping away from home is not involved is subject to the normal substantiation requirements.

77. However, travelling allowance rates now determined for Northern Territory Judges are not set after any enquiry likely to be acceptable to the Commissioner, and nor are they all at or below the comparable Federal rates. For this reason it is the view of the Tribunal that any travelling allowance paid to a Judge for a visit to Brisbane or Perth will have to be shown as assessable income and require substantiation under section 900-50 of the *Income Tax and Assessment Act 1997* and the applicable Tax Ruling.
78. As to the Commissioner's essential test that any rate be reduced to one third of the applicable rate when non-commercial accommodation, as when staying with friends or relatives or in an owned residence, is used, this condition is not and never has been attached to Territory Judges' travelling allowance rates of payment. Consequently, it is probable that all travelling allowance payments being made to Judges are assessable income.
79. The current determination of travelling allowance rates for Judges makes provision for the situation where some of the daily costs meant to be covered in the allowance rate are actually met separately by the Territory. In these cases the allowance payable is substantially different than those accepted by the Commissioner (the equivalent CRT rates), viz:

where the government meets the accommodation cost and:

	NT Judge <u>Any locality</u>		Federal Judge	
			<u>Alice Springs</u>	<u>Capital City</u>
(a) all meals	\$68		\$20	\$21
(b) one meal	\$89	Breakfast	\$76	\$108
		Lunch	\$75	\$96
		Dinner	\$57	\$77
(c) no meals	\$130		\$94	\$130

80. It will be noted that many of the allowances provided to Judges under the current determination are in excess of the accepted yardstick and are probably assessable income. Curiously, the Territory does not cover the situation where two meals are directly funded.
81. Under the 14 March 2005 Territory determination, it is only where the Territory meets the accommodation and/or meals elements of the daily costs that reductions in the entitlement take place. According to the principles laid down by the Commissioner the entitlement to a non assessable travelling allowance element arises only where the cost is born by the recipient. If

anyone else but the Territory Government meets an accommodation or meal cost for a Judge then travelling allowance is payable. Presumably, if a Judge attended a conference hosted by a State or the Federal Government, full travelling allowance would be payable to him or her. However, if so, such payments would be assessable income in the view of this Tribunal.

82. The majority of Judges' determinations state that where a house or flat is provided as a temporary residence during duty at any centre, the rent thereon will be fixed by the Attorney-General in consultation with the Judge. The flat in the Alice Springs Courthouse is the only residence to which this applies at present, and the rent for Judges has been set at \$10 per day since June 1994. The Department of Justice has informed the Tribunal that it intends to increase the rent to a commercial level on the advice of the Valuer-General.
83. One reason for the low rent is that the Judges themselves meet some of the furnishing and recurrent costs of the flat. The Tribunal recommends that the provision of all capital items within the Alice Springs flat, and the operating, maintenance and cleaning thereof, be the responsibility of the Government and not the Judges who happen to stay there.
84. At the same time Judges occupying that residence are now provided with a taxable travelling allowance of \$210 per day. Because the whole daily travelling allowance amount is now taxable, the Judges must keep substantiation records for all food and incidentals in addition to the receipts for the nominal rent.
85. To simplify matters the Tribunal recommends that the flat be fully serviced and provided rent free to the circuit Judges, not just those with provision of this flat covered in their determinations. Further, in accordance with the guidelines accepted by the Tax Commissioner, the Judges should receive the maximum meals and incidentals component of the travelling allowance for Alice Springs that does not need to be substantiated (currently \$94 per day).
86. The current Territory determination entitles a Judge or acting Judge a travelling allowance of \$82 where he or she is absent on business for at least 10 hours without an overnight stay. This is odd, for if a Judge is absent for a full day, and the Territory meets the cost of accommodation, the entitlement is for an allowance of \$130. Also, whilst the Territory entitlement to extra travelling allowance where there is an authorised accompanying spouse is the same as that for a Federal Court Judge, the Territory pays an amount of \$25 per day if no extra accommodation costs are generated by the presence of that spouse. According to the Commissioner's rulings any travelling allowance paid when an overnight stay is not involved is an assessable amount, as is the unsubstantiated \$25 per day payment.
87. When the CRT determines travelling allowance rates and conditions these become effective immediately, notwithstanding the right of subsequent disallowance by either House of Parliament. This is so the Judge is not out of pocket during what would otherwise be a protracted hiatus. If ever there were to be disallowance then partial repayment would need to be extracted.

88. In the Northern Territory any determination drawing on the Federal one is not made until the Federal disallowance period has expired, just in case there is such disallowance. Retrospective reimbursement of any incremental change for a particular locality visited is made to any Judge who has travelled during the period concerned.
89. The administrative implications are similar with either of the routes adopted. However, in fairness to the Judges (given the extreme rareness of disallowance) the immediate determination is recommended.
90. The Tribunal recommends that:
- (a) a Judge's entitlement to travelling allowance should accrue during:
 - (i) duty outside Darwin;
 - (ii) travel under certain formal invitations; and
 - (iii) travel to certain conferences and conventions.
 - (b) accommodation provided for Judges on duty outside Darwin should be fully equipped and rent free.
 - (c) Judges and acting Judges should be paid Federal Court Judge rates of travelling allowance for each overnight and part day stay while on duty or official travel, except that the daily locality rate for Yulara should be paid as though the Federal Judge rate were \$466.
 - (d) unavoidably higher travelling costs should be compensated for under the same conditions as for a Federal Judge.
 - (e) where a Judge or an acting Judge is accommodated in private, non-commercial accommodation, such as the home of a family member or friend, a rate of one third of the specified travelling allowance should be payable (rounded upwards to the nearest dollar).
 - (f) when an entity other than the Judge or acting Judge meets the cost of accommodation and/or meals for the Judge or acting Judge, the allowance should be reduced to the same extent as it would be for a Federal Judge
 - (g) a Judge travelling on official business for at least 10 hours without an overnight stay, should be entitled to an assessable payment of \$82 .
 - (h) where a spouse is entitled to travel with a Judge or an acting Judge, the Judge or acting Judge is entitled to extra travelling allowance in an amount equal to that verified as the difference between what the Judge or acting Judge would have paid for accommodation without the spouse and that actually paid. If no verified difference is established, an assessable amount of \$25 per day should to be paid as supplemental travelling allowance.
 - (i) an tax opinion should be sought on the substantiation requirements of each of the travelling allowance elements in the determination.

Northern Territory Allowance

91. Public sector employees in the Northern Territory, having resident dependents who do not earn more than the weekly minimum adult wage, are entitled to a Northern Territory Allowance of \$960 per annum¹³.
92. The benefit has also been available to Judges for many years.
93. The future quantum of this Allowance, the qualification for it, or even its very existence, being tied as it is to the wording of the By-law and to determinations from time to time by the Commissioner for Public Employment, is uncertain. In the interests of certainty, the Tribunal recommends that the actual amount be included in the Judges' determination.

LEAVE

Ordinary Leave

94. Judges are not entitled to take paid or unpaid leave of absence. Most are entitled to an annual return airfare for themselves and their family to Adelaide or its equivalent cost towards overseas travel, and, in accordance with their determination, this is to be usually taken up during the court vacation or, in special circumstances, during the year when they have no matters programmed for them.
95. In 1984 the Attorney-General allowed the Chief Justice discretion to approve up to 7 weeks "annual leave" for Judges within these non-sitting time arrangements. The Tribunal recommends that it should be specifically provided for in the remuneration determination. The discretion to approve leave, within the limit of this entitlement, should rest with the Chief Justice.
96. Current personal determinations for acting Judges each contain the following paragraph:

"If the Judge sits for a period of more than two months he is to be paid pro-rata leave credits at the prescribed daily rate."
97. Just what the annual leave credits to be pro-rated are is not stated, so the clause has probably never had any legal effect. The Tribunal recommends that acting Judges be entitled, after sitting for an aggregate of more than 2 months, to be paid, at the end of their commission, for leave accrued as pro rata with the annual Judge entitlement.

Long Service Leave

98. Judges are not entitled to long service leave. They are entitled to a payment in lieu of long service leave when they retire or die, to a maximum of 52

¹³ By-law 26 and CPE determination 1 of 2005.

weeks of pay accruing at 5.2 weeks of leave per year of service, under the *Supreme Court (Judges Long Leave Payments) Act*.

99. That Act provides that the retirement/death payment be reduced by any leave taken. This reduction requirement is a standard drafting procedure, comprehending a situation where long service leave is taken under some other authority, (the Act was copied from the Commonwealth Act of the same name, and in the Commonwealth leave may be granted at administrative discretion). The Act itself certainly doesn't grant authority to grant such leave and the determination of benefits for Judges doesn't either. Nevertheless, a practice had arisen under which a Judge could actually take a year's leave against this money entitlement, or less after some shorter period with the permission of the Attorney-General, on the basis that the reduction provision itself implies an administrative right to determine a right to this leave.
100. In May 1996 the Attorney-General approved such an administrative arrangement. This authority purports to allow Judges to take 6 months paid long service leave after each 5 years of service. The reduction of the maximum allowed under the previous authority was included at the request of the Chief Justice, who said that any longer period of absence would require the appointment of an extra Judge.
101. The Auditor-General, in his February 2002 report to Parliament, observed that these administrative arrangements for long service leave have no foundation in either the Act or a determination. The Chief Justice has told the Tribunal that similar administrative arrangements allowing long leave to be actually taken during service were in place for Federal Judges, who have the favour of a similar long service payments Act, through specific Federal Cabinet approval. The Tribunal has confirmed that this is so.
102. What distinguishes the Territory situation with that applying in the Commonwealth is that the long leave benefit is legislated to be part of a Judge's remuneration in the Territory but it is not regarded as part of a Judge's remuneration in the Commonwealth. The Department of Justice has since informed the Tribunal that amendments to long service leave payments legislation to render the arrangements lawful are in train.
103. The Tribunal recommends that
 - (a) the long leave benefits of a Judge be in accordance with the *Supreme Court (Judges Long Leave Payments) Act 1980*; and
 - (b) that the *Supreme Court (Judges Long Leave Payments) Act 1980* be amended specifically to entitle a Judge to take long service leave during service and to validate grants of long service leave made in the past.

TRAVEL EXPENSES MET

104. Existing personal determinations contain reasonably common provisions as to Judges' travel entitlements and removal expenses.
105. The Tribunal recommends that all general conditions covering: the cost of travel to be met; the use of warrants and credit cards to commit travel expense; prior notice of airfare use; and the non-transferability of airfare entitlements; should be imported into the new generic determination.
106. With the entitlement for all Judges to an annual return family airfare out of the Territory, some personal determinations limit the destination to Adelaide, while others can be to any mainland capital city. Following a request from the Judges for uniformity, the Department of Justice has considered this issue and has agreed that all Judges should have a choice of capital cities. From Darwin the variation of airfare cost to the other capital cities is not significantly different to the Adelaide fare. With that change the Tribunal recommends that all of the general annual airfare entitlement provisions should be imported into the generic determination.
107. The official travel entitlement part of the personal determinations has been imported into the recommendations with one change. Under the current determinations a Judge is entitled to be accompanied by his or her spouse when on duty for more than a week in Alice Springs. It has been pointed out that there is no cost implication if an unaccompanied Judge, performing duty for an extended period in Alice Springs, flies back to Darwin for a weekend. The Tribunal agrees that this option should be granted. Accordingly, the Tribunal recommends that the official travel part be imported into the generic determination with that addition. It also recommends that an acting Judge's entitlement to travelling allowance while in Darwin continues, provided that his or her permanent residence is elsewhere.
108. The removal expenses part of the personal determinations contains common wording. The Tribunal recommends that it also be imported.

MOTOR VEHICLES

109. Each Judge is entitled to be provided with a fully serviced official car, selected by the Attorney-General after consultation with them, for use at their discretion within the Territory. This car is of the same class of cars as is offered to the heads of Government Agencies. He or she is also entitled to an official car whilst on duty in Alice Springs.
110. Two issues have come to the attention of the Tribunal in respect of these entitlements.
111. Firstly, the personal determinations for all but two of the Judges restrict the drivers of these cars to the Judge, the respective spouse and the respective Associate. The Department of Justice wrote to the Tribunal about this restriction in the following terms:

"another issue which has arisen is the use of the vehicle provided to judges by close family members such as children. I understand that a practice has developed whereby permission is given to children of judges to use the vehicles from time to time and I have recently agreed to continue that practice pending the result of your inquiry. Accordingly I request that you deal with this issue in the course of your inquiry."

and, in a later submission, the Department submits that all Judges should be able to nominate persons other than those authorised in the determination to drive the primary car for them from time to time.

112. Secondly, the Department of Justice supports the use of the primary car for trips outside of the Northern Territory, provided that running expenses are met by the Judge.
113. All current determinations of remuneration refer to the cars provided as "official" cars. There is no explicit entitlement for these cars to be used for other than official purposes. A limited degree of private use for the Judge's purposes may be already occurring. Both the extra driver change and the use-out-of-Territory changes imply an expansion of private use rights, whatever they may now be.
114. Territory Magistrates have these limited private rights for some time now, however, the value of such rights when granted was taken into account when the salary of the Magistrates was determined in the year concerned.
115. One Judge has an entitlement to use his own car as the official car, in lieu of that provided above, and to have all operating, registration and insurance costs associated with that car met by the government.
116. Judges of the Federal Court may choose to have a fully maintained private plated car under the rules of the Commonwealth's Executive Vehicle Scheme, in which case a salary sacrifice or annual payment of \$750 is paid by the Judge. In Victoria the equivalent contribution is \$832. Alternatively, Judges may elect to use their own cars, with reimbursement of that car's running costs of up to \$8,000 pa.
117. In some other States Judges are entitled to a car, in others they are not. In cases where cars are supplied, it is usual that the car is a private plated and fully maintained government Fleet vehicle, the official and private usage of which is subject to standard conditions including driver and usage restrictions.
118. In those States where cars are not supplied, it is usual that a conveyance allowance is paid to all Judges and the Judges are able to lease vehicles through the respective State Fleet scheme if they wish. These allowances do not count for pension purposes.
119. Leased cars may be used for interstate travel for leave.

120. The Tribunal recommends that each Judge should be entitled to a fully maintained official vehicle of an appropriate type and model at his or her choice within NT Fleet policy, and, subject to an annual contribution of \$750, that car should be able to be used:
- (a) by the Judge or his or her nominated driver for the Judge's official and private purposes, subject to any guidelines as to official use requirements as are made by the Chief Justice; and
 - (b) for travel by the Judge outside of the Northern Territory, in which case fuel costs are to be met by the Judge (limit of 7 weeks without approval).
121. Acting Judges are supplied with the same class of official motor car for the period of their duty in Darwin. The Tribunal recommends that this continue to be the case, and that the acting Judge should have the same private use rights and right to nominate another driver as does a Judge.
122. Where a Judge is absent from Darwin, the Judge must, at the request of the Attorney-General, return the official vehicle. In three of the earlier personal determinations this request may only be made if an acting Judge is appointed for the period of that absence. The Tribunal recommends that the Attorney-General retain the power to request return of the car during any period of absence by a Judge, and that the different provisions applying to the earlier Judges be saved in the schedules to the determination.
123. The Tribunal also recommends that a Judge or acting Judge on duty in Alice Springs, should be provided with a car.

NEWSPAPERS AND PERIODICALS

124. The personal determinations variously provide that the Attorney-General or the Department of Justice has discretion to decide which newspapers and periodicals are to be supplied to a Judge. The Auditor-General has noted that although this is a minor matter it does create a relationship with executive authority and may impinge upon judicial independence. He recommended that this benefit should be approved "by an independent Remuneration Tribunal".
125. The Tribunal recommends that the current entitlement to newspapers and periodicals be replaced by an obligation that each Judge be supplied with newspapers and periodicals of his or her choice to a maximum annual combined subscription cost of a fixed dollar amount. That amount should be at least the same as that now established as the highest under the current arrangement for any Judge, so no detriment occurs. On the basis of Departmental records, that figure has been recommended herein to be \$2,000.

COMMUNICATIONS

126. Currently serving Judges are entitled to have a home telephone, with all operating costs met by the Territory, and to have a telephone card for personal use when in Alice Springs or out of the Northern Territory. The Tribunal recommends that these entitlements become standard.
127. Serving Judges are also given a mobile telephone, all costs relating to which, including personal calls, are met by the Territory. The Chief Justice is also given a facsimile machine for use in his home. These communications benefits are not determined for them. The Tribunal recommends that these benefits be included in the generic determination.

STAFF

128. Each Judge now has the same entitlement in his or her own determination to an associate and a private secretary, so the Tribunal recommends that it be imported into the generic determination.
129. The current common entitlement of acting Judges to the services of an associate and a secretary are also recommended to be imported.

ROBES AND WIG

130. Each Judge now has the same entitlement to robes and a wig, so the Tribunal recommends that it be imported into the generic determination.

HOUSING

131. Only one Judge is still entitled to be provided with a family home in Darwin, and to full-time domestic help. The Department of Justice has informed the Tribunal that this entitlement has been informally traded for rental assistance on a residential unit in Darwin, the cost of which is the equivalent of the net cost to the Department of providing a house. The Tribunal recommends that this amended entitlement for that Judge be preserved during the balance of his tenure of office.

DOMESTIC ASSISTANCE

132. Two Judges have an entitlement to part-time domestic help, with details as agreed between them and the Attorney-General.
133. The Auditor-General has noted that the need for such agreement may impinge upon judicial independence.
134. One Judge has the entitlement to full-time domestic help but has waived this as part of his swap from residence provision to rental assistance.

135. Another Judge is allowed domestic help under an administrative arrangement that includes his foregoing 20% of his entitlement to secretarial assistance.
136. As the Judges have not raised this as an issue, and as it is not proposed that the entitlement be extended to any other Judges, the Tribunal recommends that this entitlement, including any trade-off or waiver, be recognised during the balance of their tenure of office.

YARD MAINTENANCE

137. One Judge is allowed residential yard maintenance of 8 hours per week under administrative discretion. The Tribunal recommends that this be formalised for the balance of his term of office.
138. One Judge, with an entitlement to a residence, is entitled to yard and pool maintenance where he is continuously absent for more than three months. That right has been waived as part of his swap from residence provision to rental assistance. The Tribunal recommends that this waiver be recognised for the balance of his term of office

BOARDING SCHOOL FARE

139. Two Judges have an entitlement to an annual return airfare for a dependent child attending school in a State. The Tribunal recommends that this entitlement be preserved during the balance of their terms of office

RESIDUAL BENEFITS

140. Most current Judges will have benefits that vary in some respect from the benefits extended under the generic determination. It is recommended that these variations be determined in a Schedule for each of them by name. This treatment is necessary to prevent detriment, to produce administrative certainty, and to ensure open accountability. Clearly, the need for these schedules will disappear over time.
141. To ensure that no benefit is missed during the move to a generic determination, each Schedule should contain a savings clause to ensure the survival of any other pre-existing benefit held by that Judge. Also, any residual benefits that come to later attention should be particularised in the respective Schedule to the succeeding determination. The Tribunal repeats its view that this savings provision does not extend to the travelling allowance entitlement, as that is included in the generic determination on the basis that the Judge is not expected to gain or lose financially as a result of travelling on official business.
142. Examples of benefits to be included in the schedules include:

One Judge	Right to have rent met on Darwin accommodation, with previous rights attaching to that accommodation, including domestic help and yard maintenance waived.
Three Judges	Right to part-time domestic assistance at home (one is formalisation of a discretionary benefit provided in return for a reduction in secretarial assistance).
One Judge	Right to yard assistance at home (formalisation of discretionary benefit).
Two Judges	Right to student boarding school fares.

FLEXIBILITY

143. The Department of Justice has submitted that it should to be empowered to make variations to a Judge's remuneration in cases where the variation concerned is for the same or similar purpose and does not involve any additional cost to the government. Where there is dispute, the Department suggests that the issue should be able to be referred to this Tribunal for a decision.
144. As noted in this report, there has already been at least one case where a trade-off of remuneration elements has occurred administratively. In that case the trade-off was between secretarial assistance and domestic assistance. Though the Tribunal has recommended that this swap be formalised as a residual matter, it was clearly not one where the purposes of each side of the swap was the same or even similar.
145. Travelling allowance rates and conditions combine to produce an entitlement that is finely tuned, both in terms of allowing official travel to be taken at no net cost to a Judge or an acting Judge, and in terms of it not being ruled as assessable income by the Commissioner for Taxation. Consequently no swap should be able to occur that involves this entitlement.
146. Long service leave related entitlements and superannuation entitlements are fixed in legislation, and it may not be possible to waive or supplement the benefits flowing through those Acts by means of a determination.
147. It is not just the cost to government (including fringe benefits tax, that needs to be considered when benefits are swapped:
- Firstly, there is the issue of whether the Administrator can determine that changes to benefits in his remuneration determination may be made from time to time by someone else, whether by agreement or not. The Act provides that only he has the remuneration setting prerogative.
 - Secondly, there would always need to ensure that the smooth running of the court was not interfered with as a result of the change. This could easily be the case where a travel entitlement or leave is concerned.

- Thirdly, swaps could lead again to the situation where there could be the perception that confidential private deals are being done as between the judiciary and the executive, and that the swaps may be unbalanced.
 - Fourthly, there would be no way that interested parties or even other Judges or acting Judges could find out what benefits their colleges were receiving.
 - Fifthly, a situation could arise where a Judge's capacity to perform is reduced, for example where secretarial or associate time is sacrificed.
148. Consequently, cost neutral remuneration changes are not just something that might be agreed upon between the executive government and an individual Judge or acting Judge.
149. Because there are so many interests at stake, it is recommended that such swapping be permitted, but only with the agreement of this Tribunal. This is so it can be demonstrated that there is:
- (a) independent verification that:
 - (i) there is no net cost increase, on the advice of the Department of Justice;
 - (ii) neither the operation of the court, nor the capacity of the Judge to serve, is adversely affected, on the advice of the Chief Justice; and
 - (iii) the integrity of the remuneration system is retained.
 - (b) notification, so that side deals cannot be alleged.
150. The recommendations made as a result of this Inquiry follow.

NORTHERN TERRITORY OF AUSTRALIA
REMUNERATION TRIBUNAL

RECOMMENDATION No. 1 of 2005

JUDGES

NORTHERN TERRITORY OF AUSTRALIA

REMUNERATION TRIBUNAL

RECOMMENDATION No 1 of 2005

JUDGES

In accordance with a request from the Administrator that the Tribunal from time to time inquire into and report with recommendations on the remuneration and allowances to be paid to Judges, the Tribunal makes the following recommendations:

1. DETERMINATION OF REMUNERATION

- 1.1 That when tabling this report the Minister should confirm that:
 - 1.1.1 no further changes to Judges' benefits will occur without consideration of prior advice from the independent Remuneration Tribunal;
 - 1.1.2 every determination of benefits will be tabled in the House within six sitting days of it being made.
- 1.2 That a generic determination of all Judges' benefits be made forthwith, superseding all prior determinations;
- 1.3 That the new determination should contain benefits that are in accordance with the recommendations contained in this report, and incorporate schedules of additional, or variations of, benefits to apply to individual Judges;
- 1.4 The Commissioner for Taxation should be asked for an opinion on which elements of travelling allowance, if any, paid in accordance with this determination are assessable income for Judges.
- 1.5 That the *Supreme Court Act* and the *Remuneration Tribunal Act* be amended, in the same manner as recent changes covering the remuneration of Magistrates, so that determinations of remuneration for Judges are made by the Remuneration Tribunal.
- 1.6 That the *Supreme Court Act* be amended to provide that both the salary of full-time Judges, and the locality rates of travelling allowance payable to Judges (including discounts where some travel costs are met by others) are the same as the respective salary and the rates payable to Federal Judges, with the salary of the Chief Justice being the same as that of the Chief Justice of the Federal court.

2. SALARY, ALLOWANCES AND OTHER BENEFITS

2.1 Exclusion

No Judge, additional Judge, or acting Judge whose salary is paid by an entity other than the Northern Territory should receive any remuneration under the following recommendations.

2.2 Definitions

In these recommendations:

the word "Judge" includes the Chief Justice, unless otherwise distinguished, but does not include an acting Judge, except for the travelling allowance entitlement.

the words "Federal Judge" mean a Judge of the Federal Court of Australia.

a reference to a member of the family of the Judge in these recommendations is a reference to a parent, parent-in-law, child or step-child of the Judge who normally resides with the Judge as part of his or her family.

2.3 Salary and Sitting Fees

2.3.1 The salary of the Chief Justice and of each Judge should be the same as the salary payable from time to time to the Chief Justice and to Federal Judges, respectively.

2.3.2 An acting Judge should be paid a sitting fee as follows:

$$\text{Weekly rate} = \frac{\text{Annual Judge salary}}{313} \times 6$$

$$\text{Daily rate} = \text{one fifth of the weekly rate.}$$

2.4 Allowances

2.4.1 Travelling allowance

2.4.1.1 Official travel for travelling allowance purposes includes:

- 2.4.1.1.1 a period when the Judge is on official duty in the Territory otherwise than in Darwin;
- 2.4.1.1.2 a period when the Judge is out of the Territory as a result of a qualifying invitation¹⁴, and is

¹⁴ See recommendation 2.5.4.12.1

engaged on matters resulting from that invitation; and

- 2.4.1.1.3 the time spent travelling to and returning from and attending a biennial legal convention or annual judicial conference held in Alice Springs or outside the Territory.
- 2.4.1.2 No rent should be charged on any house or flat provided by the Territory at a centre outside Darwin for use as a temporary residence by the Judge during the performance of duty at that centre. The reasonable costs of equipping and servicing such accommodation should be met by the Territory.
- 2.4.1.3 Judges and acting Judges who are travelling on duty or on authorised official travel should be entitled to travelling allowance at the same rate as a Federal Judge for each overnight and part day stay, except that the daily locality rate for Yulara should be paid as though the Federal Judge rate were \$466.
- 2.4.1.4 Where there is unavoidable higher accommodation cost, the travelling allowance may be increased, provided that the same conditions as would apply to a Federal Judge in the same circumstances are applied.
- 2.4.1.5 Where a Judge is accommodated in private, non-commercial accommodation, such as the home of a family member or friend, a rate of one third of the specified travelling allowance should be payable (rounded upwards to the nearest dollar).
- 2.4.1.6 When an entity other than the Judge meets the cost of accommodation and/or meals and the Judge, the travelling allowance payable to the Judge should be reduced to the same extent as it would be for a Federal Judge.
- 2.4.1.7 For any period when an acting Judge is on official duty in the Territory but outside Darwin:
- 2.4.1.7.1 accommodation should to be provided, or the cost of accommodation should to be met, by the Department of Justice; and
- 2.4.1.7.2 travelling allowance should to be paid at the same 'accommodation supplied' rate as for a Federal Judge.
- 2.4.1.8 A Judge travelling on official business for at least 10 hours without an overnight stay, should be entitled to an assessable payment of \$82 .

2.4.1.9 Where a spouse travels, pursuant to the determination, with a Judge or acting Judge on duty or official business, the Judge or acting Judge is entitled to be paid extra travelling allowance in an amount equal to that verified as the difference between what the Judge or acting Judge would have paid for accommodation without the spouse and that actually paid. If no verified difference is established, an assessable amount of \$25 per day should to be paid as supplemental travelling allowance.

2.4.2 Northern Territory Allowance

Where a Judge fulfils the criteria establishing the right of a public sector employee to payment of the Northern Territory Allowance, the Judge should be paid a Northern Territory Allowance at the rate of \$960 per annum.

2.5 **Other Benefits**

2.5.1 Pension

The pension benefits of a Judge should be specified as being in accordance with the *Supreme Court (Judges Pensions) Act*.

2.5.2 Annual Leave

2.5.2.1 A Judge should be entitled to seven weeks of annual leave. The period of such leave should coincide with the annual Court vacation except to the extent that the Chief Justice, in special circumstance, authorises part of it to be taken at another time.

2.5.2.2 An acting Judge sitting for more than 2 months should be entitled, at the end of his or her commission, to be paid for pro-rated Judges' leave at the then daily sitting fee.

2.5.3 Long Leave

2.5.3.1 the long leave benefits of a Judge should be in accordance with the *Supreme Court (Judges Long Leave Payments) Act 1980*;

2.5.3.2 the *Supreme Court (Judges Long Leave Payments) Act 1980* should be amended specifically to entitle a Judge to take long service leave during service and to validate grants of long service leave made in the past.

2.5.4 Travel Expenses Met

General Conditions

2.5.4.1 The conditions attaching to calculation of, use of, and notice to utilise, an airfare entitlement should remain the same, viz:

2.5.4.1.1 the amount of the entitlement is the cost the most direct reasonably available flight;

2.5.4.1.2 a warrant or credit card for travel at Territory expense should not, without the prior written approval of the Attorney-General, be used for-

- (A) travel outside Australia,
- (B) offsetting the cost of overseas travel;
- (C) rail, ferry or tram travel or bridge or other tolls;
- (D) taxis, hire cars or other forms of hire or charter transport; or
- (E) travel by a member of the Judge's staff.

2.5.4.2 A Judge should have to give the Department reasonable written notice of intended use of any airfare entitlement;

2.5.4.3 Airfare entitlements should not be transferable or able to be converted to cash.

Annual Airfare Entitlement

2.5.4.4 A Judge should be entitled to one annual business class return airfare for him or herself, his or her spouse and each or his or her dependent children normally resident with the Judge for travel between Darwin and a mainland capital city.

2.5.4.5 This fare entitlement is to be taken during a court vacation or, after consultation with the Attorney-General, at any other time;

2.5.4.6 Where the Judge wishes to use the fare entitlement for overseas travel, the Judge is entitled to a contribution towards the travel equivalent to the cost of a return business class airfare between Darwin and Adelaide;

2.5.4.7 The fare entitlement accrues on each anniversary of the appointment of the Judge and is, where practicable, to be used during the ensuing year of service. The entitlement accumulates, but not more than 2 entitlements may be used in any one calendar year.

2.5.4.8 Where the airfare entitlement in respect of a dependent child of a Judge is used otherwise than for travel in the company of either of the child's parents, the entitlement should be for economy class travel only.

2.5.4.9 A Judge, his or her spouse and each dependent child travelling with that Judge on an airfare entitlement should be entitled to one item of excess personal baggage within the airline size limits.

C Official Travel

2.5.4.10 The Judge is entitled to business class return air travel to locations in the Territory but outside of Darwin for the performance of duty there, and where the period of duty is reasonably expected to exceed one week, either:

2.5.4.10.1 a business class return airfare for his or her accompanying spouse; or

2.5.4.10.2 where the Judge travels alone, one business class return airfare to Darwin.

2.5.4.11 An acting Judge whose permanent residence is in Darwin should have the same duty travel entitlements within the Territory as does a Judge in 2.5.4.10.

2.5.4.12 The Judge is entitled to business class return air travel-

2.5.4.12.1 for himself or herself and, where his or her spouse is invited to accompany him, for his or her spouse to travel to a State or the Australian Capital Territory to attend any function to which the Judge is invited by reason of his office (a qualifying invitation under recommendation 2.4.1.1.2) by –

- (A) the Governor-General;
 - (B) the Commonwealth Government;
 - (C) a State Government or the Australian Capital Territory Government; or
 - (D) a Law Society, Bar Council, or other body approved in writing by the Attorney-General;
- and

2.5.4.12.2 for the Judge and his or her spouse to attend biennial legal conventions or annual judicial conferences.

2.5.4.13 An acting Judge whose permanent residence is outside the Northern Territory is entitled to:

- 2.5.4.13.1 business class return air travel for each period of duty in Darwin for himself, and if requested, for an accompanying person;
 - 2.5.4.13.2 accommodation of a suitable standard paid for by the Department of Justice;
 - 2.5.4.13.3 travelling allowance when occupying the accommodation supplied in Darwin at the same rate as for a Federal Judge travelling in Darwin when accommodation is provided; and
 - 2.5.4.13.4 return business class travel to Adelaide or Darwin when on duty in the Territory but outside of Darwin for a period of 3 weeks or more, or subject to the approval of the Chief Executive Officer of the Department of Justice, another Australian capital city for himself and, if requested, for an accompanying person.
- 2.5.4.14 The Judge where travelling by air on court business, shall be entitled to such items of excess baggage as are required for official purposes.
- 2.5.4.15 The Judge shall be entitled to membership of one domestic airline lounge of his or her choice.

D Removal Expenses

- 2.5.4.16 On voluntary retirement or on retirement by reason of age or ill health the Judge shall be entitled to a one way business class airfare for himself, his or her spouse and each member of his or her family residing with him or her in the Territory at the time of retirement, and the cost of freight by road of the personal property of the Judge, his or her spouse and each of those family members from Darwin to a capital city in Australia.
- 2.5.4.17 In the event of the death of the Judge, his or her spouse and each member of the Judge's family residing with him at the time of his death is entitled to a one way business class airfare and the cost of freight by road of the personal property of the spouse or family member, as the case may be, from Darwin to a capital city in Australia and the Territory will also meet the cost of removing the personal property of the Judge.

2.5.5 Motor Vehicles

- 2.5.5.1 Each Judge should be entitled to a fully maintained official motor car of an appropriate type and model at his or her choice within NT Fleet policy, and, subject to an annual contribution of \$750, that car should be able to be used:
 - 2.5.5.1.1 by the Judge or his or her nominated driver for the Judge's official and private purposes, subject to any guidelines as to official use requirements as are made by the Chief Justice; and
 - 2.5.5.1.2 for travel by the Judge outside of the Northern Territory, in which case fuel costs are to be met by the Judge, but not for a period in excess of 7 weeks without the approval of the Attorney-General.
- 2.5.5.2 Where a Judge is absent from duty he or she should, at the request of the Attorney-General return the official motor car.
- 2.5.5.3 A Judge, when performing duties in Alice Springs, should be provided with an official motor car for use by that Judge, his spouse or that Judge's associate during the period of that Judge's duty in Alice Springs.
- 2.5.5.4 An acting Judge should be provided with a motor car of the same standard as provided to Judges, for his or her use while on duty. The acting Judge should have the same usage rights with this car, and right to nominate another driver, as does a Judge

2.5.6 Newspapers and Periodicals

The Judge should be provided with his or her own selection of relevant newspapers and periodicals within a total annual subscription cost of \$2,000.

2.5.7 Communications

- 2.5.7.1 The Judge should be entitled, at the house in which he or she resides, to the provision of a telephone service, and all operating costs of the service should be met by the Territory.
- 2.5.7.2 The Judge should to be provided with a Telstra credit card for his personal use when in Alice Springs or out of the Territory.
- 2.5.7.3 The Judge should to be provided with a mobile telephone, with all ownership and usage costs met by the Territory.

2.5.7.4 The Chief Justice should to be provided with a facsimile machine at the house in which he or she resides.

2.5.8 Staff

2.5.8.1 The Judge should be entitled to the services of an associate and a private secretary chosen by him or her.

2.5.8.2 The Judge should not be able to dispense with the services of an associate or private secretary except after reasonable prior written notice to the Attorney-General.

2.5.8.3 If an acting Judge requires an associate during his or her period of duty, a locally recruited associate should be provided. The services should be provided through the Department of Justice in consultation with the Judge.

2.5.8.4 An acting Judge should be provided with the services of a secretary on a shared basis.

2.5.9 Robes and Wig

The Judge should be provided with one set of legal robes and a wig.

2.6 Residual Benefits

2.6.1 Schedules to the determination should contain, and determine for all serving Judges as applicable, the benefits enjoyed by each of them that are not included in the determination of generic remuneration.

2.6.2 Each Schedule should contain a savings clause to ensure the survival of any unique pre-existing benefit held by the Judge that is not contained therein.

2.6.3 Benefits to be included in the schedules include:

- | | |
|--------------|--|
| One Judge | Right to have rent met on Darwin accommodation, with previous rights attaching to that accommodation, including domestic help and yard maintenance waived. |
| Three Judges | Right to part-time domestic assistance at home (one is formalisation of a discretionary benefit provided in return for a reduction in secretarial assistance). |
| One Judge | Right to yard assistance at home (formalisation of discretionary benefit). |
| Two Judges | Right to student boarding school fares. |

2.6.4 Any residual benefits that are not included in a personal schedule that come to attention should be particularised in the respective schedule to the succeeding determination.

2.7 Flexibility

2.7.1 With the agreement of the Remuneration Tribunal, a Judge should be entitled to vary his or her entitlements without increasing the cost to the Territory.

2.7.2 The variations should not become effective until they are determined within the schedule to the determination in the name of that Judge.

Dated this 19th day of May 2005

A handwritten signature in black ink, appearing to be 'O. Alder', written in a cursive style.

O. Alder
Member