APPENDIX 7: DECISIONS OF INTEREST

AVIATION

CONFIDENTIAL AND CIVIL AVIATION SAFETY AUTHORITY

[2013] AATA 927; 20 December 2013

Senior Member Egon Fice

Whether the applicant's pilot licences should be suspended because of alleged conduct relating to one of the qualifying exams

To obtain a pilot's licence, a person must pass a theory examination consisting of seven separate subject-parts, one of which relates to flight planning. Since 2002, the flight planning exam has been conducted on a computer with candidates asked a subset of the questions available in the exam database. The applicant failed the flight planning exam twice but passed on the third occasion in March 2011. At that time, the exam questions were based on a Boeing 727-200 series aeroplane and candidates were permitted to bring the *Boeing 727 Performance and Operating Handbook (Abbreviated)* into the exam room to refer to when answering the questions.

In September 2012, the Civil Aviation Safety Authority (CASA) received an email from an informant alleging the widespread use of cheat sheets in the flight planning exam. It was suggested that sheets containing sufficient material to identify particular exam questions and their answers were inserted into the Operating Handbook. The informant alleged that he had received the cheat sheet from the applicant.

Regulation 298A of the *Civil Aviation Regulations 1988* proscribes various types of conduct in relation to exams, including:

- giving another person any information about the questions contained in the examination paper, being information that might give anyone an unfair advantage in the examination
- during the examination, using any material or aid that CASA does not permit to be used.

CASA found that the applicant had passed the cheat sheet to another person in contravention of regulation 298A and decided to suspend his pilot licences for a period of six months.

The Tribunal noted that regulation 298A was in substantially the same form as when it was first introduced in 1994, at which time the exam was conducted in a paper format. The term 'examination paper' was defined in the regulation to mean 'all of the documents provided by the person conducting a written examination to persons attempting the examination'. The Tribunal held that it was appropriate to interpret the regulation such that references to the examination paper were references to any of the questions that could be put to a candidate during the exam, not only the questions put to any particular candidate.

The Tribunal was satisfied on the evidence that the applicant had knowingly given another person information about questions in the exam which might give a person an unfair advantage. While there was no direct evidence that the applicant had cheated when he passed the flight planning exam, the Tribunal drew inferences from the probative evidence and found that

the applicant did have access to, and used, the cheat sheet in that exam, material which a candidate was prohibited from taking into the exam room.

The Civil Aviation Regulations allow CASA to vary, suspend or cancel a licence if the holder:

- has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft, or
- is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such a licence.

The Tribunal was satisfied that the applicant's conduct in cheating in the exam and passing the cheat sheet on to other potential candidates amounted to a breach of his duty regarding the safe navigation or operation of an aircraft. It also found the applicant was not a fit and proper person to hold a pilot's licence.

The Tribunal affirmed the decision to suspend the applicant's licences, ordering that the period of the suspension commence from the date of the Tribunal's decision. The Tribunal also noted that the applicant would be required to take the flight planning exam again.

ENVIRONMENT

ZOUBI AND MINISTER FOR THE ENVIRONMENT

[2014] AATA 86; 24 February 2014

Deputy President Robin Handley

Whether the applicant should be granted permits to export two Gang-gang Cockatoos and two Glossy Black Cockatoos

In early 2012, Mr Zoubi requested information from the Department of Sustainability, Environment, Water, Population and Communities about whether he could export a Gang-gang Cockatoo as a pet or for exhibition purposes. The Department advised that these birds are not eligible for export as pets and that, for the exception for exhibition purposes to apply, the birds must be used in a public exhibition with cultural, scientific or conservation content.

In June 2012, Mr Zoubi applied for a permit to export two Gang-gang Cockatoos and two Glossy Black Cockatoos for research purposes. This application was refused. The Minister's delegate was not satisfied Mr Zoubi had sufficient resources and qualifications to conduct the research and pointed to a lack of evidence that the primary purpose of Mr Zoubi acquiring the cockatoos was for research. Mr Zoubi made a further application in January 2013 which was accompanied by a letter from a zoologist at the Jerusalem Zoo stating he would provide support for Mr Zoubi's research. This application was also refused by the Minister's delegate on the same grounds. Mr Zoubi applied to the Tribunal for review of that decision.

The granting of export permits for native birds is governed by the *Environment Protection and Biodiversity Conservation Act 1999* and the *Environment Protection and Biodiversity Conservation Regulations 2000*. The principal issue for the Tribunal was whether the export of the birds was for the purposes of research and, more specifically, whether the following requirements were met:

- the specimens would be used for the purpose of scientific research
- the research was for the acquisition of a better understanding and/or increased knowledge of the taxons to which the specimens belong
- the research would be done by a person or institution that has sufficient resources and qualifications
- the animals would be held in a way that is known to result in minimal stress and risk of injury.

The Tribunal considered that Mr Zoubi's initial contact with the Department raised questions about the purpose for which he was seeking to export the birds and that a reasonable decision-maker would look to further evidence to be satisfied the concerns were not justified. In the context of an application of this kind, the Tribunal expected that a research proposal would provide an appropriate level of detail. The Tribunal found, however, that the information provided was less than satisfactory. Mr Zoubi had also not established how his proposed research would contribute to a better understanding and/or increased knowledge of the cockatoos.

The Tribunal was not satisfied that Mr Zoubi had any relevant qualifications or experience in conducting research. While curriculum vitae of the zoologist at the Jerusalem Zoo indicated he had qualifications and experience to guide Mr Zoubi, the Tribunal emphasised that the research itself was to be conducted by Mr Zoubi. The Tribunal also considered it relevant that the Department had found Mr Zoubi was not suitably equipped to manage, confine and care for the birds.

The Tribunal was not satisfied the export of the birds was for the purposes of research and affirmed the decision.

INDUSTRY AND RESEARCH DEVELOPMENT

MOUNT OWEN PTY LIMITED AND INNOVATION AUSTRALIA

[2013] AATA 573; 16 August 2013

Deputy President Brian Tamberlin and Member Conrad Ermert

Whether activities claimed to be undertaken by the applicant were research and development activities for the purposes of the Income Tax Assessment Act 1936

The applicant is the owner of an open-cut coal mine at Mount Owen in New South Wales. It decided to mine to depths of 250 metres and beyond in order to extract the high quality coal seams located at those depths. Increasing the depth of the pits to more than 250 metres presented a number of challenges and the applicant engaged in activities to meet these challenges.

The applicant claimed to have conducted numerous activities between January 2000 and December 2005 which qualified for the purpose of the research and development tax incentive under the *Income Tax Assessment Act 1936*. These activities included mine modelling and concept design, experimentation and trial testing, wall control systems, through-seam blasting and evaluation of results. Innovation Australia decided that only some of the claimed activities were research and development activities. The applicant applied to the Tribunal for a review of that decision.

There was extensive evidence before the Tribunal, oral evidence from the applicant's General Manager and from experts in geology, mining engineering, geotechnical engineering and blasting. The experts in geology and mining gave their evidence at the same time in accordance with the Tribunal's concurrent evidence procedure. The Tribunal also visited the mine site in order to better understand the evidence.

The Tribunal considered whether the claimed activities could be characterised as research and development activities within the meaning of section 73B of the Act. This involved assessing whether the activities:

- were systematic, investigative and experimental, involved either innovation or high levels of technical risk, and were carried out for the purpose of acquiring new knowledge, or creating new or improved materials, products, devices, service or processes, or
- were undertaken for a purpose directly related to the carrying on of those core activities.

The Tribunal was not satisfied on the evidence that any of the activities could be characterised either as core activities or directly related activities.

In considering whether the activities had in fact been carried out as claimed, the Tribunal observed that the oral and documentary evidence did not provide any sufficient basis for determining that this was the case. The contemporaneous material and other records did not approach the level of precision which would be expected of a systematic investigation process or a well-documented research and development program.

The Tribunal set aside Innovation Australia's decision and substituted a decision that none of the applicant's claimed activities should be accepted as being research and development activities.

MOTOR VEHICLE STANDARDS

GADHVI AND MINISTER FOR INFRASTRUCTURE AND REGIONAL DEVELOPMENT

[2014] AATA 65; 11 February 2014

Senior Member Rodney Dunne and Senior Member Nicholas Manetta

Whether the applicant should be allowed to import a motorcycle that did not meet Australian standards

Mr Gadhvi purchased a new motorcycle in India 11 months before he emigrated to Australia. The Bajaj Pulsar motorcycle did not meet Australian design requirements and was therefore a 'non-standard vehicle' under the *Motor Vehicle Standards Act 1989*. Mr Gahhvi wanted to import the motorcycle into Australia and applied for permission to do so under the *Motor Vehicle Standard Regulations 1989*.

The Minister has a general discretion under regulation 11 to approve the importation of a non-standard motor vehicle. Regulation 13 addresses cases where a present or prospective Australian citizen or permanent resident has purchased and used a vehicle overseas and is moving to Australia with the intention of remaining indefinitely. It allows the Minister to approve an importation if certain preconditions are satisfied, one of which is that the applicant must have owned the vehicle for a continuous period of 12 months immediately before arriving in Australia.

The Minister's delegate, the Administrator of Vehicle Standards, refused Mr Gadhvi's application to import the motorcycle. He found that the requirements of regulation 13 were not met as Mr Gadhvi had owned the motorcycle for only 11 months before arriving in Australia. The Minister decided not to exercise the discretion in regulation 11.

The Tribunal agreed it could not approve the importation under regulation 13 as Mr Gadhvi did not satisfy the precondition relating to length of ownership of the vehicle.

In relation to the application of the general discretion in regulation 11, the Tribunal considered whether it could take into account that Mr Gadhvi had fallen marginally short of the 12-month period of continuous ownership but otherwise satisfied all of the preconditions in regulation 13. It held that there is nothing in the Act or the Regulations to indicate that these matters cannot be taken into account. The general discretion can be used to alleviate the arbitrariness of the 12-month precondition in regulation 13.

The Tribunal considered a range of other matters. It noted that Mr Gadhvi had only modest means and would prefer to use the motorcycle rather than his car. There was also no evidence that Mr Gadhvi wished to bring the vehicle into Australia for the purposes of resale nor that the motorcycle had been judged unfit on safety grounds.

The Tribunal set aside the decision and remitted the matter with a direction that importation of the motorcycle be approved subject to such conditions, if any, that ought to be attached to the approval so that the motorcycle may be safely used on Australian roads.

NATIONAL DISABILITY INSURANCE SCHEME

MULLIGAN AND NATIONAL DISABILITY INSURANCE AGENCY

[2014] AATA 374; 13 June 2014

Senior Member Jill Toohey and Professor Ronald McCallum, Member

Whether Mr Mulligan met the disability criteria for access to the National Disability Insurance Scheme

Mr Mulligan has a number of medical conditions, including chronic ischaemic heart disease, cardiomyopathy and sciatica from ruptured discs in his lower back. Since 1994 he has been on a Disability Support Pension while continuing to work when he is able. Mr Mulligan applied to become a participant in the National Disability Insurance Scheme. He was seeking funding for someone to mow his lawn which he cannot manage himself because he experiences severe shortness of breath when he exerts himself.

To be eligible for the National Disability Insurance Scheme, a person must meet the access criteria set out in the *National Disability Insurance Scheme Act 2013*. These comprise age, residence and disability requirements. The National Disability Insurance Agency determined that Mr Mulligan met the age and residency requirements but did not meet the disability requirements. Mr Mulligan applied to the Tribunal for review of that decision.

The disability requirements are specified in section 24 of the Act and all of them must be met. In determining whether Mr Mulligan satisfied those requirements, the Tribunal considered the terms of the Act and the content of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2013*.

The Tribunal found that Mr Mulligan met the following requirements in the ACT:

- he has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition
- the impairments are, or are likely to be, permanent
- the impairments affect his capacity for social or economic participation
- he is likely to require support under the NDIS for his lifetime.

The Tribunal was not satisfied, however, that he met the requirement that his impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities: communication, social interaction, learning, mobility, self-care or self-management. Having considered evidence given by Mr Mulligan and an occupational therapist, the Tribunal acknowledged that Mr Mulligan's capacity for functioning in the areas of mobility, self-care and social interaction was undoubtedly reduced. However, it was not satisfied that his capacity is substantially reduced. The Tribunal did not believe Mr Mulligan's inability to mow his laws was sufficient to say that he has substantially reduced functional capacity in relation to self-management which the Tribunal understood to mean 'a person's ability to plan and manage their everyday life including his or her financial affairs'.

The Tribunal affirmed the decision that Mr Mulligan was not eligible to become a participant in the National Disability Insurance Scheme.

YOUNG AND NATIONAL DISABILITY INSURANCE AGENCY

[2014] AATA 401; 20 June 2014

Senior Member John Handley and Senior Member Jill Toohey

Whether a portable oxygen concentrator and an insulin pump were reasonable and necessary supports for the applicant

Mr Young's medical conditions include type 1 diabetes and emphysema. He relies on insulin for his diabetes which he administers using an insulin pump. He needs supplementary oxygen for his emphysema. When outside the house, he uses a portable oxygen cylinder on a trolley.

In August 2013, Mr Young became a participant in the National Disability Insurance Scheme. When a person becomes a participant, the National Disability Insurance Agency helps the person prepare an individual plan which includes a statement of the general supports that will be provided to the participant and the reasonable and necessary supports that will be funded through the National Disability Insurance Scheme. Mr Young's plan included funding for a range of supports. He requested funding for a portable oxygen concentrator and an insulin pump but the National Disability Insurance Agency decided that both are more appropriately funded through the health system. Mr Young applied to the Tribunal for review of that decision.

For a support to be funded under the National Disability Insurance Scheme, it must meet the criteria set out in section 34 of the *National Disability Insurance Scheme Act 2013* which include whether the support is most appropriately funded or provided through the National Disability Insurance Scheme and not other general systems of service delivery or support services such as the health, employment or education systems. The *National Disability Insurance Scheme (Supports for Participants) Rules 2013* set out considerations that must be taken into account in deciding whether a support is most appropriately funded through the National Disability Insurance Scheme. These include that the National Disability Insurance Scheme:

- will be responsible for supports related to a person's ongoing functional impairment and that enable the person to undertake activities of daily living
- will not be responsible for the diagnosis and clinical treatment of health conditions.

The Tribunal found that a portable oxygen concentrator would be more convenient and less embarrassing for Mr Young than using a portable oxygen cylinder and that the insulin pump had made a great difference to his life. However, the Tribunal was not satisfied that Mr Young is unable to undertake daily living activities or participate in the community without them because alternatives exist. The Tribunal also found that the primary purpose of both the oxygen concentrator and insulin pump is the treatment of his health conditions. Their essential character as clinical treatment is not changed by the fact that they are different methods of delivering oxygen and insulin.

It was argued for Mr Young that, because funding for the oxygen concentrator and insulin pump is not available through mainstream health services, they are most appropriately funded through the National Disability Insurance Scheme. The Tribunal held, however, that whether or not funding is available through other general systems is not the test of whether a support is most appropriately funded or provided through the National Disability Insurance Scheme. The fact that the health system does not fund entirely, or even at all, what is essentially clinical treatment, or some other form of support does not make it the responsibility of the National Disability Insurance Scheme.

The Tribunal affirmed the National Disability Insurance Agency's decision.

NATIONAL SECURITY AND PASSPORTS

BLBS AND DIRECTOR-GENERAL OF SECURITY AND ANOR

[2013] AATA 820; 19 November 2013

President Justice Duncan Kerr, Deputy President James Constance and Senior Member Graham Friedman

Whether ASIO had reasonable grounds to suspect the applicant would be likely to engage in conduct that might prejudice the security of Australia or a foreign country – whether the applicant's Australian passport should be cancelled and he should be required to surrender his foreign travel documents in order to prevent him from engaging in that conduct

BLBS, an Australian citizen, planned to travel overseas in 2010, including to Yemen. When he arrived at the airport, he was taken aside, interviewed by the Australian Federal Police and ordered to surrender his Australian passport and other travel documents. The Australian Security Intelligence Organisation had made an adverse security assessment about BLBS and then requested the Minister for Foreign Affairs to cancel his passport and order the surrender of his foreign travel documents. The Minister accepted those recommendations and made decisions accordingly. BLBS applied to the Tribunal for review of ASIO's adverse security assessment and the decisions made by the Minister as a consequence of that assessment.

Section 14 of *the Australian Passports Act 2005* provides that ASIO can make a request for the refusal or cancellation of an Australian passport if it suspects on reasonable grounds that the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country and that the person should be refused a passport in order to prevent the person from engaging in the conduct. Section 15 of the *Foreign Passports (Law Enforcement and Security) Act 2005* is expressed in similar terms but allows the Minister to order the surrender of a person's foreign travel documents.

Before considering the merits of the decisions that had been made, the Tribunal dealt with three preliminary issues.

- The Tribunal considered whether ASIO's requests to the Minister under the Acts complied with the law. The Tribunal held that the critical jurisdictional fact that must exist for the Minister to exercise the power to make a cancellation or refusal decision under the Australian Passports Act is that the relevant suspicion be held by ASIO, whether or not it has been communicated in terms to the Minister. However, a failure by ASIO to provide details of the nature of the suspicion would mean the Minister cannot perform the statutory duty. In this case, the Tribunal was satisfied that the nature of ASIO's suspicions was adequately conveyed to the Minister, albeit not strictly in terms of the language of the legislation.
- The second issue was whether the Tribunal is required to defer to the assessments and opinions of ASIO and its officers when reviewing the security assessment decision. It was submitted that Australian courts, when considering public interest immunity, have emphasised the significance which must be given to the views of senior government officials on matters of national security. The Tribunal held that its merits review function is not analogous to judicial review. The Tribunal's function would be devalued and its credibility undermined if it did not submit every challenged security assessment to independent and rigorous examination.
- The third issue was whether the Tribunal could set aside a decision of the Minister under the Australian Passports Act or Foreign Passports Act even if it is not persuaded to set aside ASIO's adverse security assessment. The Tribunal disagreed with its earlier decision in *TCXG and Director-General of Security and Anor* [2013] AATA 284 (10 May 2013), that this could not occur. It held that the assessment and the Minister's decision are legally distinct matters and can thus be each separately reviewed.

The evidence before the Tribunal included unclassified and classified material. The matters in the unclassified material said to give rise to ASIO's security concerns were summarised as: BLBS had maintained associations with persons of security concern and was likely to share their view that violence was acceptable to achieve a political and religious end; BLBS had planned to travel to Yemen without plans and preparation for a course of religious studies that he had stated he intended to undertake; and, in interviews with ASIO, BLBS had responded to questions about his beliefs by stating it was a person's choice to travel overseas to fight in the defence of Islam if Islam was under attack. The Tribunal was also invited to draw adverse conclusions about his intentions from alleged inconsistencies and evasions in his responses to questioning by ASIO and the Australian Federal Police. Restricting its consideration to the unclassified materials, the Tribunal was not satisfied that ASIO's adverse security assessment could be justified.

The Tribunal also had to take into account the classified materials and evidence, much of which was covered by certificates issued by the Attorney-General preventing its disclosure to the applicant. The Tribunal undertook that any questions BLBS's counsel wanted to put to classified witnesses would be asked by the Tribunal in closed proceedings which it did.

Taking into account all of the evidence, the Tribunal concluded that ASIO had a proper basis for making an adverse assessment and reasonable grounds to suspect BLBS would be likely to engage in conduct which might prejudice the security of a foreign country and that his passport should be cancelled to prevent him from doing so. The Tribunal also found that the Minister's decisions to cancel BLBS's passport and require the surrender of his foreign travel documents were correct and preferable.

The Tribunal affirmed the decisions.

PERSONAL PROPERTY SECURITIES

CIRILLO AND REGISTRAR OF PERSONAL PROPERTY SECURITIES

[2013] AATA 733; 11 October 2013

Deputy President Katherine Bean

Whether the Registrar should have removed an entry on the Personal Properties Register that Mr Cirillo's vehicle continued to secure a debt

In 2007, Mr Cirillo purchased a motor vehicle with the assistance of finance provided by a finance company. In 2010, he borrowed additional funds which were consolidated with the original loan. The consolidated loan was secured against the vehicle. The finance company registered its interest in the vehicle on the New South Wales Register of Encumbered Vehicles (REVS) in 2007 and again in 2010. When the new national Personal Property Securities Register (PPS Register) was established on 30 January 2012, the details on REVS relating to Mr Cirillo's debt were migrated to the PPS Register.

In December 2011, the finance company sold a number of debts to another finance company, including Mr Cirillo's debt secured by the vehicle. In March 2012, the original company registered a change statement for the purposes of the PPS Register to change the secured party details to the second finance company and its parent company.

In July 2012, Mr Cirillo sought to remove the registration from the PPS Register by issuing what is known as an amendment demand to the second finance company and its parent company. Mr Cirillo then lodged an amendment statement with the Registrar, enclosing the amendment demand. Following correspondence with the second finance company and its parent company, the Registrar decided not to amend the PPS Registrar as requested. Mr Cirillo applied to the Tribunal for review of that decision.

The principal issue for the Tribunal was whether there were reasonable grounds for suspecting that the amendment sought by Mr Cirillo was not authorised under the *Personal Property Securities Act 2009*.

Mr Cirillo argued that the vehicle did not secure a debt owed by him for a variety of reasons, including that:

- one of the contracts he was alleged to have entered into with the original finance company was not signed
- the original finance company unlawfully assigned its rights to the second company
- the figures relating to the amount of the debt were inaccurate.

The Tribunal rejected Mr Cirillo's arguments, finding that the evidence before it established that he continued to owe a debt, secured by the vehicle, that the debt had been lawfully sold to the second finance company and that the PPS Register had been appropriately amended to reflect the change of secured parties. The Tribunal concluded there were reasonable grounds to suspect that the amendment demanded by Mr Cirillo to remove the registration was not authorised under the Act.

The Tribunal affirmed the decision.

PRACTICE AND PROCEDURE

HAWKINS AND MINISTER FOR THE ARTS

HAWKINS AND MINISTER FOR INFRASTRUCTURE AND REGIONAL DEVELOPMENT

[2013] AAT 835; 25 November 2013

[2014] AAT 152; 11 March 2014

Deputy President Ray Groom and Member Sandra Taglieri

Whether the Tribunal had jurisdiction to decide the application – whether the application should be dismissed as frivolous and vexatious

Mr Hawkins was an agent appointed by Mr Kennedy to negotiate the sale of the 'Kennedy Collection', an important collection of Australian art, furniture, silver, jewellery, pottery and porcelain. After rejecting an offer from the National Museum of Australia, an overseas buyer was found for parts of the collection. The sale was negotiated subject to the granting of an export permit allowing the items selected by the buyer to be exported as a single collection. Mr Hawkins corresponded with the Department of Regional Australia, Local Government, Arts and Sport about obtaining an export permit for the 'collection as a collection' under the *Protection of Movable Cultural Heritage Act 1986*.

The Department advised Mr Hawkins that it was not possible for the Minister to grant an export permit for the objects as a single entity. Each object would need to be assessed separately. Mr Hawkins ultimately made applications for permits for the export of eight items of jewellery.

On 10 May 2013, a delegate of the Minister advised Mr Hawkins that she had decided to refuse export permits for seven of the eight items. The export permit for the eighth item was granted, subject to a condition. Mr Hawkins applied to the Tribunal for review of those decisions. In his reasons for the application, he stated that he was contesting the right of the Government to select items from the Kennedy Collection, destroying its integrity and compromising the sale.

The Minister asked the Tribunal to dismiss the application under section 42A(4) of the *Administrative Appeals Tribunal Act 1975*, contending that the applicant was content with the actual decision that was made and wanted the Tribunal to review decisions that were not reviewable by the Tribunal: namely, the refusals to grant a permit to export the collection.

The Tribunal noted that the Protection of Movable Cultural Heritage Act allows for application to be made to the Tribunal for review of any decision by the Minister to refuse to grant a permit or to impose a condition. Mr Hawkins had applied for review of the decisions dated 10 May 2013 and the Tribunal concluded that it did have jurisdiction to review the decisions. Moreover, the Tribunal could not dismiss the application under section 42A(4) of the AAT Act as that section applies only when the Tribunal Registrar or a Deputy Registrar forms a view that a decision does not appear to be reviewable by the Tribunal and writes to the applicant inviting the person to show, within a specified time, that the decision is reviewable. As no such letter was written to Mr Hawkins, the Tribunal held it was not empowered to dismiss the application under that provision.

The Tribunal then considered whether the application should be dismissed under section 42B of the AAT Act on the basis that it was frivolous or vexatious. Mr Hawkins's own statements indicated that he considered the decisions of 10 May 2013 were correct. The proceedings were not instituted for the purpose of obtaining an adjudication on those decisions but for the collateral purpose of seeking a ruling on the interpretation of the word 'collection' and other related questions.

The Tribunal held it is well-established that litigation is vexatious if it is not a bona fide attempt to have a court or tribunal adjudicate the issues specified to be in dispute. The Tribunal was satisfied that these proceedings were initiated for a collateral purpose and also that they were futile with no reasonable prospect at all of success.

The Tribunal dismissed the application under section 42B of the AAT Act.

SUPERANNUATION GUARANTEE

DOMINIC B FISHING PTY LTD AND COMMISSIONER OF TAXATION

[2014] AATA 205; 10 April 2014

Senior Member Bernard McCabe

Whether the owner of a commercial fishing vessel had to pay compulsory superannuation contributions for the crew

The applicant was operating a commercial fishing vessel out of a port in central Queensland and held a commercial fisher's licence under the *Fisheries Regulation 2008* (Qld). The vessel was usually captained by the director of the applicant and, on each voyage, he would be joined by up to four crew members, typically experienced fishermen. The Commissioner of Taxation decided the crew members were employees for the purposes of the *Superannuation Guarantee (Administration) Act 1992* and that the applicant was obliged to make superannuation contributions in respect of those individuals. The applicant applied to the Tribunal for review of that decision.

The evidence before the Tribunal was that, while at sea, the vessel would anchor at a central spot each day and the fishermen would each board a small motorised boat called a 'dory'. The dories would head off to remote locations where the crew members would spend all or part of the day fishing. Upon their return to the vessel, each fisherman would unload his catch, and the fish would be tallied and stored. When the vessel returned to port, the catch would be sold to a wholesaler or processor under the terms of a contact with the applicant. The applicant would pay each fisherman pursuant to a separate agreement between the applicant and the fisherman.

In advance of each voyage, each member of the crew was given a written document which provided that the parties were joint venturers for the purposes of a single voyage. It also provided that the cost of maintaining the vessel was the responsibility of the applicant but all of the parties would contribute a specified amount towards the operating costs. Each party was required to

bear the costs of sickness and accident insurance and no party would be liable for any accident or mishap that occurred during the voyage. The evidence of the applicant's director and a crew member was that the captain of the vessel was ultimately responsible for the safety of the vessel but decisions about where to fish and other operational matters were made jointly.

The Tribunal observed that, in deciding whether a worker is an employee, the courts have emphasised the need to consider:

- the extent to which the worker is subject to the direction and supervision of the would-be employer, and
- the extent to which the individual is integrated into the would-be employer's organisation so that it can be said the individual is part of the same business, as opposed to operating his or her own business.

In relation to whether the crew members were acting under the control of the applicant, the Commissioner noted they were 'assistant fishers' for the purposes of the Fisheries Regulation which required them to act under direction of the licensed commercial fisher. However, the Tribunal was not persuaded this was decisive in this case. On the basis of all of the evidence, it concluded that the applicant's characterisation of the crew members as independent businessmen who came together with the applicant to carry out a joint enterprise was to be preferred. It decided the crew members were not employees for the purposes of the Act.

The Tribunal set aside the decision.

TERTIARY EDUCATION REGULATION

WILLIAMS BUSINESS COLLEGE LTD AND MINISTER FOR EDUCATION; WILLIAMS BUSINESS COLLEGE LTD AND TERTIARY EDUCATION QUALITY AND STANDARDS AGENCY

[2014] AATA 371; 12 June 2014

Senior Member Anne Britton

Whether an additional condition should be imposed on the College's registration for the Bachelor of Business degree – whether the College's application for registration renewal should be refused

In December 2011, Williams Business College Ltd was approved by the NSW Department of Education and Training as a higher education provider that could offer a Bachelor of Business course. On 29 January 2012, it became registered under the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act), the then new national law for the regulation of higher education. The majority of the College's students were overseas students and so it was also subject to the *Education Standards for Overseas Students Act 2000* (ESOS Act).

In the early days of offering the Bachelor of Business course, the College faced significant problems, in part because of personnel problems and debts inherited from its previous operations. In early 2013, the Dean of the College, the Chair and most members of its Governing Council, and all of the members of its Academic Board, resigned. New appointments were subsequently made, including a new Dean in April 2013 and a new Chair of the Council in May 2013. The College also approved a Higher Education Governance Charter.

In March 2013, the Tertiary Education Quality and Standards Agency (TEQSA), acting as delegate of the Minister under the ESOS Act, imposed a condition on the College that it not issue any new confirmations of enrolment. TEQSA found that the College was in breach of a number of requirements, including that it was continuing to provide misleading information to students and prospective students in its marketing. In October 2013, TEQSA decided to refuse the College's application for renewal of registration on the basis that it was not continuing to

meet the *Higher Education Threshold Standards Framework (Threshold Standards) 2011*. The College applied to the Tribunal for review of both decisions. The Tribunal stayed the operation of the decisions pending completion of the review.

Before the Tribunal, the College contended that it had delivered quality education throughout its two years of operation, and that the shortcomings identified by TEQSA, none of which related to educational quality, had progressively been addressed under the leadership of the new Chair of the Council and the Dean. The Tribunal agreed there had been significant improvements, but also found that problems continued.

The Tribunal focused on three aspects of the Threshold Standards: the financial viability and sustainability of a higher education provider, its corporate and academic governance and its history in managing business operations. Having considered the available information about the College's financial position and budgets, the Tribunal was not satisfied that the College was financially viable. In relation to governance, the Tribunal found that the Council had failed to take steps to appraise itself of the true financial position of the College, constituting a failure to regularly monitor a potential risk to its higher education operations. As such, the College had not shown sound corporate governance as required under the Standards. The Tribunal was also not satisfied that the College had shown a sound track record in managing its business operations. Having found that the College did not continue to meet the Threshold Standards, the Tribunal held that it could not renew the College's registration.

The Tribunal affirmed both of TEQSA's decisions but decided to delay the date of operation of the decision to refuse the College's registration to allow the students to complete the current semester.