Appendix 6: Decisions of interest

The following summaries of Tribunal decisions provide an idea of the types of issues raised in the Tribunal's major jurisdictions and highlight some of the more important or interesting decisions delivered during the reporting year.

Civil Aviation

Re McIver Aviation Pty Ltd and Civil Aviation Safety Authority

[2005] AATA 391, 3 May 2005—
Deputy President GD Walker

This case concerned an application for review by McIver Aviation Pty Limited (McIver) to review a Civil Aviation Safety Authority (CASA) decision revoking McIver's Air Operator's Certificate (AOC). The AOC allowed McIver to conduct aerial advertising by banner towing from its single turbine and piston engine helicopters. CASA determined that McIver could only operate its helicopter in flight banner towing services in accordance with the directions specified in the schedule to CASA's decision. This decision was made by CASA after reassessing McIver's banner towing operations and determining that they did not comply with Civil Aviation Order (CAO) 29.6 which provided, among other things, that operations could only be conducted if there was prior local government and police approval. McIver submitted that CAO 29.6 only referred to sling load operations and not banner towing.

In particular, the Tribunal was required to consider the method of towing used by the applicant, the Helicopter Overland Banner System (HOBS), a system designed with four special safety features, namely that the banner was attached by a dual attachment system to both the aircraft's cargo hook and a special cable that passes through the cabin of the aircraft; that all the components were made of lightweight material; the weight to hold down the banner was a sack filled with sand which could be dispersed if necessary; and the system employs a parachute which slows the descent of the banner and causes it to fold around itself reducing the landing area of the banner.

McIver has been conducting its business, out of Bankstown Airport, for approximately four years as the holder of an AOC, the last AOC being issued to McIver on 3 October 2002. That certificate, issued pursuant to regulation 149(1) of the *Civil Aviation Regulations 1988*, permitted McIver to conduct banner towing operations in accordance with CAO 29.6 Helicopter External Sling Load Operations, departing from Kingsford Smith Airport via the eastern shores of Botany Bay over water not below 1000 feet above mean sea level. Other operations outside the Sydney Basin Area had to be discussed with CASA in advance.

Evidence was given, including the presentation of a video, of how the HOBS system was developed and tested, including testing in the United States, where the system has successfully gained accreditation with the Federal Aviation Administration. No safety-related incidents or concerns have arisen in the United States since its introduction. Since McIver commenced using the HOBS system in 2001, no incidents or accidents have occurred. All McIver's pilots hold the appropriate endorsements to use the system and are instructed personally in its use by the designer. The evidence of McIver's chief pilot, who described how the banner is connected to the helicopter by the HOBS system, including being secured by a "belly band" which passes through the helicopter itself, was that it was not a sling load operation. The banner is connected to the aircraft on the ground and is not disconnected until the aircraft returns to its departure point, unlike, for example, where the statues on the Sydney Centrepoint Tower were slung into place and then later removed.

CASA argued that the HOBS method of operations was both a sling load and a towing operation. There was an attachment which was the cargo hook, there was an object (the banner), which was suspended from the hook, there was a pick up of the banner by the helicopter and carriage and release. It was irrelevant, CASA argued, that the banner was not released until after landing.

Having considered the evidence, the Tribunal found that the HOBS operation involved virtually no risk of injury or damage if the banner were released from the helicopter and that CAO 29.6 did not apply to the HOBS operations of its own force, that order being appropriate to the special risks involved in sling load operations but not those of banner towing. The Tribunal found that while it would be reasonable to impose conditions on banner towing related to approval of aircraft type, pilot qualifications, carriage of persons and the conduct of operations, as CAO 29.6 does, such conditions should be framed in the context of towing operations and bearing in mind the safety improvements made possible through the HOBS system.

Another condition required that operations over a populous area and within 5 km of a fixed location (such as a sports stadium) be limited to one continuous towing period no longer than 30 minutes on any given day. In so far as that limitation was based on a desire to limit competition among advertisers, it did not accord with the economic competition principles set out in the *Trade Practices Act 1974* (Cth). It was not based on safety grounds.

The Tribunal considered that the other conditions imposed were reasonable in the circumstances and should be affirmed.

The Tribunal therefore remitted to CASA for reconsideration conditions 1 and 11 of the directions specified in Schedule 1 to CASA's decision, in accordance with the recommendations of the Tribunal.

Compensation

Re Perry and Australian Postal Corporation

[2004] AATA 873, 20 August 2004—
Ms M Carstairs, Member

This case concerned a preliminary issue raised by the Australian Postal Corporation, namely that Ms Perry was prevented from seeking compensation by virtue of the operation of section 48 of the *Safety Rehabilitation and Compensation Act 1988* (the SRC Act).

Section 48 of the SRC Act disallows a claim for compensation where damages have been received for the same injury. Section 48(1) of the Act applies where an employee recovers damages in respect of an injury to the employee or damage in respect of the loss of, or damage to, property used by the employee, being an injury, loss or damage in respect of which compensation is payable.

The Australian Postal Corporation asserted that Ms Perry was statutorily disbarred from making a claim under the SRC Act due to a prior settlement she received when she took a complaint to the Human Rights and Equal Opportunity Commission (HREOC).

Ms Perry had a foot condition, which was not work-related, for which she had undergone a number of operations. She took several months leave from work in 2002 for one of these operations. When Ms Perry returned to work she was placed on restricted duties, and was allocated to a work roster that did not attract penalty rates. Her usual shift attracted penalty rates. Ms Perry, assisted by her union representatives, commenced negotiations with Australia Post on the basis that other workers on restricted duties were not prevented from working penalty shifts. An internal investigation at Australia Post recommended that Ms Perry be given safety shoes and also outlined proposed future access to penalty-rated shifts.

In late 2002 Ms Perry lodged her compensation claim which was for work-related stress. Her claim

was rejected. Early in 2003 she lodged a separate complaint with HREOC.

The HREOC matter was resolved by conciliation and resulted in a small monetary settlement in favour of Ms Perry. The terms were that the settlement was a full and final settlement, and notwithstanding the fact that liability was denied, the settlement discharged and indemnified the parties from any further actions, claims, demands or proceedings in respect of the matter.

At the preliminary hearing in the compensation matter Australia Post submitted that the settlement in the HREOC matter excluded Ms Perry's claim for compensation under the SRC Act. The Tribunal agreed that there was much common ground between Ms Perry's HREOC complaint and her compensation claim, but concluded that when the two claims were examined in the context of the written material and evidence about the settlement of the HREOC matter, they were not identical claims.

For the HREOC claim Ms Perry had to satisfy section 5 of the *Disability Discrimination Act 1992* (Cth), which covers circumstances where a person is discriminated against, or treated less favourably on the basis of a disability. The HREOC complaint was concerned with the perceived discriminatory treatment Ms Perry felt she received with respect to her foot disability. The compensation claim related to stress arising from her perceived treatment in the workplace. The two claims were also distinguishable in the remedies sought. In the HREOC complaint Ms Perry sought an apology, an end to the perceived discriminatory conduct, and to be provided with a second pair of safety shoes.

The Tribunal concluded that the HREOC claim was not a claim for stress, though the compensation claim was. The Tribunal therefore determined that section 48 of the SRC Act was not satisfied as the settlement was 'not in respect of an injury… being an injury… in respect of which compensation is payable under this Act'.

Having so decided, the Tribunal did not need to determine whether Ms Perry had received damages at all, as is also required by subsection 48(2) of the SRC Act. The Tribunal took into account the evidence of the Australia Post representative at the HREOC negotiations that the employer sought, in settling the discrimination complaint, to ensure the ongoing working relationship between the parties rather than determine either party's legal rights. The Tribunal commented that despite the SRC Act having a wide definition of damages, it was likely that what was contemplated was a payment in discharge of a legal liability rather than a payment for hurt feelings or some other kind of making-good.

The Tribunal concluded that Ms Perry's claim for compensation was not precluded by section 48 of the SRC Act by the settlement of her HREOC complaint.

Re Taylor and Military Rehabilitation and Compensation Commission

[2005] AATA 207, 11 March 2005—
Deputy President RJ Groom

This case considered whether the treatment of an Australian Army recruit during training contributed to the condition of post-traumatic stress disorder (PTSD) and whether PTSD was an 'injury' within the meaning of subsection 4(1) of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act).

Mr Taylor was 18 years old when he enlisted as a recruit in the Australian Army. After enlisting he travelled to the Australian Army Base at Kapooka for 13 weeks of initial training. Mr Taylor alleged that during that training he was subjected to assaults, threats, abuse and intimidation and as a result now suffers from PTSD and is unable to work.

Mr Taylor was discharged at his own request less than 11 months after enlisting in the Army. Some time after leaving the army, Mr Taylor's health and behaviour began to deteriorate. His parents were concerned and arranged for him to see the Vietnam Veterans' Counselling

Service (VVCS). Mr Taylor's first appointment with a counsellor at VVCS was in October 1995 and he has attended a psychiatrist and two psychologists on regular occasions since that time. Each of Mr Taylor's treating medical experts was of the opinion that he was suffering PTSD as a result of his treatment during his initial army training at Kapooka. Mr Taylor continued to have serious health problems and to exhibit abnormal behaviour and at the time of the hearing before the Tribunal he was unemployed and receiving a disability pension.

The main issues in this case were whether the incidents that Mr Taylor alleged actually occurred, whether Mr Taylor was suffering from PTSD and, if he was suffering from PTSD, whether it was caused by the alleged incidents or otherwise contributed to in a material degree by the applicant's employment in the army.

In his evidence, Mr Taylor relied on four specific incidents that occurred during training. The first incident was the firing of rifles in the barracks to wake recruits. Mr Taylor described how he was awoken without warning by three or four semi-automatic rifles being fired simultaneously in his barracks. In the darkness he could see the flashes of light from the muzzles and he described the sound as deafening. Mr Taylor stated that when the lights eventually came on he could see that the air was filled with heavy smoke and he described the smell of cordite as very strong. He stated that he was still in bed in a state of shock when he was dragged from his bed and into the hallway by his neck.

The second incident occurred at night when a swagger stick was pushed up Mr Taylor's nose. Mr Taylor was awoken by a corporal, who inserted the stick into Mr Taylor's nose making him lift his head. The corporal then shone a torch into his face so that he was unable to see and asked Mr Taylor if he was awake. When Mr Taylor replied that he was awake, the corporal screamed at him. Mr Taylor stated that the corporal's response terrified him.

The third incident was being terrorised and threatened by a corporal after Mr Taylor and other recruits had donated blood. On the return journey from the Red Cross the recruits were forbidden to speak and after they arrived back at Kapooka they were marched into a room. The corporal then slammed the door and began screaming at them. The corporal left the room and returned with a swagger stick and jabbed Mr Taylor in the chest with it and interrogated him, demanding to know which recruit had been talking to the nurse. Another recruit put his hand up to indicate that it was him and the corporal began screaming at him. The corporal said 'I will come and kill you all' and Mr Taylor stated that he was so terrified that he went to bed that night with his bayonet as he feared for his life.

The final incident involved Mr Taylor being assaulted by an instructor at the swimming pool at Kapooka. Mr Taylor stated that during swimming instruction he noticed another recruit in difficulties. As he thought the recruit was drowning, Mr Taylor went over to assist him. Mr Taylor stated that the instructing corporal was livid at this and called him over to the side of the pool, whereupon he struck Mr Taylor in the face with a closed fist.

The Tribunal found Mr Taylor to be a truthful witness and, combined with the evidence of other witnesses, the Tribunal found that each of the incidents had occurred largely as Mr Taylor had described. Additionally, the Tribunal found that Mr Taylor had been shocked and terrified by the various incidents, which it described as 'extreme stressors'. Indeed, the Tribunal was satisfied on the evidence that recruits undertaking training at Kapooka at the relevant time were generally subjected to an unacceptable level of repeated verbal and physical intimidation and abuse.

The Tribunal then considered the medical evidence in relation to PTSD. Medical reports and oral evidence were provided by two psychiatrists, as well as a clinical psychologist and a consultant

psychologist. A medical report by a consultant psychiatrist was also tendered in evidence, as well as several documents relevant to Mr Taylor's medical condition, including notes of interviews by the VVCS.

A psychiatrist, initially engaged by the Department of Veterans' Affairs, provided two reports. He saw Mr Taylor on only one occasion and initially concluded that Mr Taylor suffered PTSD as a consequence of his treatment in the army. This initial diagnosis was consistent with Mr Taylor's treating psychiatrist who had had 21 consultations with Mr Taylor, as well as the two psychologists who had the opportunity to interview and observe Mr Taylor on numerous occasions over an extended period of time. However, in his second report, the psychiatrist engaged by the Department withdrew his earlier diagnosis on the basis that there was doubt at to whether the alleged incidents occurred and that symptomatology had been reported that suggested another type of clinical condition (such as incipient psychotic illness or severe personality disorder). The Tribunal was therefore required to consider the merits of the conflicting expert opinions.

After detailed consideration of the evidence of each medical expert, the Tribunal rejected the reasons given by the psychiatrist in his second report when withdrawing his earlier diagnosis. The Tribunal rejected the psychiatrist's first reason for withdrawing his initial opinion, as it found that all four incidents occurred substantially as alleged by Mr Taylor. The Tribunal also rejected the psychiatrist's second reason, as it found that there was no basis to suggest that Mr Taylor had a psychosis or serious personality disorder and that he was not suffering from PTSD. The overwhelming preponderance of expert medical evidence in this case pointed to Mr Taylor suffering PTSD.

The Tribunal therefore found that Mr Taylor was suffering from PTSD. Furthermore, it was satisfied that Mr Taylor's employment in the army contributed to the onset of PTSD in a material degree. The Tribunal also found that there was evidence that Mr Taylor was no longer capable of engaging in the same level of work he was capable of immediately prior to the onset of the disease and was satisfied that there was an impairment that was likely to continue indefinitely in accordance with the definition of 'permanent' in subsection 4(1) of the SRC Act.

Pesticides

Re Questa Pool Products Pty Limited and Australian Pesticides and Veterinary Medicines Authority

[2004] AATA 1390, 23 December 2004—
Justice GK Downes, President
Professor GAR Johnston, AM, Member

In this case the Tribunal was required to decide on what terms the suppliers of a system and products for the disinfection of swimming pools and spas should be permitted to market their products.

Over ten years ago, Katali Pty Ltd (trading as Aquamatics) began marketing a pool and spa disinfectant system using copper and silver ions called the Aquabrite system. The copper and silver ions were delivered to the water by electrolysis using an electrical device, which Aquamatics called an ionic water purifier, which powers a sacrificial electrode assembly coated with copper and silver. A proprietary blend of peroxygen oxidisers, which was called Aquabrite, was added by hand. From this time, Questa Pool Products Pty Ltd marketed the same system under licence from Aquamatics using the trade name PoolFresh. At the time of the hearing before the Tribunal, Questa had recently sold its business to Monarch Pool Systems Pty Ltd which continued to market PoolFresh. Both systems are also exported overseas. Collectively, both systems have between 10,000 and 12,000 domestic pool users both locally and overseas, as well as approximately 150,000 children and adults who use public swimming pools that employ the Aquabrite system.

The electrodes and the oxidiser used in the system are considered to be agricultural chemical products under the Agriculture and Veterinary Chemicals Code (Cth). The Code is administered by the Australian Pesticides and Veterinary Medicines Authority, which regulates the sale of such products. The Authority is authorised to approve active constituents of existing chemical products, to register chemical products and to approve container labels. The Authority is also authorised to require suppliers of chemical products to cease supplying chemical products and to take other action, including recalling products. The Code also provides that permits may be granted authorising activity with respect to chemical products that would otherwise be prohibited by the Code. Permits may be either unconditional or subject to conditions and they may be limited to operate only for a certain period of time.

The Authority was aware of the disinfectant products from as early as December 1998 and it had sufficient information to decide whether registration was required. However, it was not until April 2003 that the Authority wrote to Aquamatics requiring it to immediately cease all promotion and sale of Aquabrite. Aquamatics responded that its product was not registrable because it was not a pesticide and in July 2003 Aquamatics made application for registration, without prejudice to its claim that registration was not required. That application for registration has never been finally dealt with.

In March 2004, the Authority gave Aquamatics notice of its proposal to require prompt recall of Aquabrite and invited comment. A similar letter was also sent to Questa. Recall notices requiring immediate cessation of sale and recovery of all stock were subsequently issued to both Aquamatics and Questa. Questa and Aquamatics then applied to the Tribunal for review of the recall notices and in April 2004 the Tribunal granted a conditional stay of proceedings.

On the hearing of the substantive application, the Tribunal was required to decide whether chlorine should be required to be used in connection with the system and in what quantities. Alternatively, it needed to decide if a warning as to the desirability of using chlorine should be required. Finally, the Tribunal needed to decide if the permit should be limited in time.

In July 2004 the Authority issued a *Guide for Demonstrating Efficacy of Pool and Spa Sanitisers*, partly as a means of informing Aquamatics what it would need to show before the Authority would register its product. The Guide provided for both laboratory and field testing and Aquamatics attempted to satisfactorily complete the laboratory testing, or at least part of it, prior to the hearing. However, due to various circumstances, the matter proceeded before the Tribunal on such material as was available outside the attempts to comply with the Authority's guidelines. The evidence of efficacy comprised a paper entitled 'The Aquabrite System' which included mortality tests on the efficacy of the system with *E. coli* and *Pseudomonas aeriginosa sp.*, field testing of the Aquabrite system at a public swimming pool and publications in the scientific literature.

The applicants argued that as the products had been used for a significant time with no known health incidents, the products should be permitted to be sold without special conditions at least until their efficacy has been satisfactorily determined.

The Tribunal found that the material before it did not establish whether or not the system was sufficiently efficacious for use alone in swimming pools and spas. At most there was limited evidence of efficacy which is consistent with some of the scientific literature. However, the evidence did not show that the system was not satisfactory. The Tribunal found that the evidence was not conclusive one way or the other. Additionally, although chlorine is the benchmark product, it is not without its problems and the Tribunal felt that

it was highly desirable for any possible alternative product with sufficient efficacy to be explored.

The Tribunal also noted that enforcement of the recall notices requiring all products to be recovered and all sales and marketing to cease would involve substantial cost and would have a significant impact on the businesses of Aquamatics and Monarch. Furthermore, it would also have an impact on users of the products who incurred cost in acquiring the system and installing it.

The Tribunal therefore held that the decisions to issue the recall notices should be set aside. Additionally, due to the insufficient scientific evidence relating to the efficacy or otherwise of the products the Tribunal found that there should be a limitation on the length of the permit to enable the applicants to carry out sufficient testing to achieve registration. The Tribunal therefore held that the permit should extend to 31 October 2005. Finally, given the existing history together with the limited permit, the Tribunal found that the warning does not need to be mandatory nor recommend use of a full chlorine dose. It therefore held that the products should be sold with a warning that chlorine should be used as a supplement without stipulating any precise quantity.

Practice and Procedure

Re Skase and Minister for Immigration and Multicultural and Indigenous Affairs

[2005] AATA 200, 10 March 2005—
Deputy President SA Forgie

This case concerned whether non-parties may have access to a Tribunal file prior to a substantive hearing.

Mrs Jo-Anne Skase applied for review of a decision of the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) to refuse to register her declaration of desire to resume Australian citizenship. Although Mrs Skase's application had yet to be heard, the Herald & Weekly Times Pty Ltd (HWT) asked to look at the documents on the Tribunal's file relating to her application. It did so on the bases that there had been enormous public interest in the Skase family, the proceedings were not of a highly sensitive nature and would not be affected if HWT were to look at the file and that the media's right to report on the proceedings was supported by the principle of open justice.

The Tribunal's Registrar refused HWT's initial request on the basis that releasing the documents would breach the Information Privacy Principles (the IPP) set out by section 14 of the *Privacy Act 1988* (Cth). In particular, release would breach IPP 11 which prohibits the release of personal information about an individual unless the individual concerned has consented or the disclosure is required or authorised by law. The Registrar's decision was in line with the Tribunal's *Registry Procedure Manual*. HWT asked that its request be decided by the Tribunal hearing Mrs Skase's application.

The Tribunal decided that HWT was not permitted to have access to the Tribunal's file before the hearing of the application for review of the Minister's decision.

The Tribunal held that it is bound by the IPPs as it is an 'agency' within the meaning of the Privacy Act. Although no personal information was identified by HWT, the Tribunal found that IPP 11 applies and that some of the documents on the file appeared to contain personal information. IPP 11 provided that a record-keeper who has possession or control of a record containing personal information shall not disclose it other than to the individual concerned. There are exceptions. They include situations in which the individual is reasonably likely to have been aware that information of that kind is usually passed to the person, body or agency to whom it is disclosed (IPP 11, cl. (a)). They also include situations in which disclosure is required or authorised by or under law.

Subject to the provisions of section 35 of the *Administrative Appeals Tribunal Act 1975* (the

AAT Act), the principle underlying the Tribunal's hearings of proceedings is that they shall be held in public. This is consistent with the requirement in subsection 35(3) of the AAT Act that, in making a confidentiality order under subsection 35(2), the Tribunal takes as the basis of its consideration 'the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal should be made available to the public and the parties…'.

The Tribunal rejected the submission that, unless an order has been made under subsection 35(2), the documents lodged with the Tribunal before a hearing are necessarily in the public domain. Once the hearing has been held, the requirement in subsection 35(1) that the hearing be held in public carries with it the implication that, unless an order has been made under subsection 35(2), the public has the right to have access to all of the documents that have been lodged before the hearing of the proceeding as well as the evidence that was given at that hearing and any documents that were received in evidence at that hearing. It makes no difference whether a party has relied on the material at the hearing. The word 'proceeding' in subsection 35(3) encompasses not only the substantive application, but also any incidental applications made in connection with the application for review.

The Tribunal referred to the principles developed by the courts in deciding whether to allow access to information and court files. Any differences between the courts' approach to access to documents where there has been a hearing and the Tribunal's follow from the differences between section 35, to which the Tribunal is subject, and the common law and Rules of Court, to which different courts may be subject. Subsection 35(1) is a law that requires or authorises disclosure within the meaning of clause 1(d) of IPP 11 but only when there is a hearing of a proceeding and no order has been made under subsection 35(2). A law such as subsection 35(2) giving the power to restrict disclosure of information is not.

The Tribunal did not consider it reasonably likely that Mrs Skase would have been aware that information on the file is usually passed to HWT, and therefore the exclusion in clause 1(a) of IPP 11 did not apply.

The principles considered by the Tribunal in relation to documents lodged with the Tribunal and given in evidence do not extend to documents produced in accordance with a summons. The AAT treats them separately from documents lodged in the Tribunal and the parties require leave to inspect them.

Should it be incorrect in limiting the operation of section 35 to situations where the hearing had been completed, the Tribunal found that it would have made an order under subsection 35(2) prohibiting disclosure. In making that order, the Tribunal would have taken into account the importance of public scrutiny of the Tribunal's proceedings and the public interest in ensuring that the Minister's decision is properly reviewed both procedurally and substantially. On balance, considerations that require the parties to have a reasonable opportunity to prepare and present their cases without premature public analysis outweighed past public interest and continuing media interest in Mrs Skase's affairs.

Privacy

Re Rummery and Federal Privacy Commissioner

[2004] AATA 1221, 22 November 2004—
Justice GK Downes, President
Senior Member JW Constance
Dr MD Miller, Member

In this case the Tribunal considered whether compensation should be awarded for a breach of privacy.

Mr Rummery was a policy officer and inspector with the Australian Capital Territory Department of Justice and Community Safety (the Department).

In December 1998 he prepared a brief for his director which dealt with problems associated with under-age drinking and young people attending licensed premises in Canberra for under-age discos.

Mr Rummery felt that the issues raised in the brief 'were just too dangerous to ignore', but during December Mr Rummery did not receive a response to his brief. He initially contacted the Departmental liaison officer in the office of the Attorney-General and asked for advice, however he was disciplined by his director for this action. By reason of his belief in the importance of the issues raised in the brief and the lack of response from his Department, Mr Rummery made a public interest disclosure to the ACT Ombudsman under the *Public Interest Disclosure Act 1994* (ACT) alleging that the Department had failed to enforce provisions of the *Liquor Act 1975* (ACT).

In June 1999, an officer of the Ombudsman's Office wrote to the Department in relation to the public interest disclosure and seeking its comments in order for the Ombudsman to decide what action, if any, to take. The officer did not identify Mr Rummery. In response to the letter, a senior departmental officer telephoned the officer and in the course of their conversation advised the officer that he assumed the public interest disclosure was made by Mr Rummery and he proceeded to disclose a range of personal information about Mr Rummery.

Mr Rummery subsequently learned that there had been a telephone conversation between the senior departmental officer and an officer of the Ombudsman's Office which related to him and he obtained a copy of the officer's file note of the conversation under the *Freedom of Information Act 1982* (Cth). Mr Rummery stated that he was very distressed at the content of the file note. He felt that the senior departmental officer's disclosures indicated that that officer did not accept that he was acting out of genuine concern for young people and that he was devaluing his work. Mr Rummery also felt that the officer was trying to cast aspersions on him. As a result he suffered injury to his feelings and humiliation.

After learning of the disclosures, Mr Rummery lodged a complaint with the Federal Privacy Commissioner. The investigation took almost four years, at least partly as a result of the detailed submissions of the Department which submitted that Mr Rummery's public interest disclosure was frivolous and vexatious.

The Privacy Commissioner found that it was not relevant to the question of whether Mr Rummery's disclosure was frivolous and vexatious for the Department to disclose detailed information about Mr Rummery's background and his working relationship with the Department. Accordingly, the disclosure of the personal information was not authorised by Information Privacy Principle 11.1(d). The Commissioner found Mr Rummery's complaint that his privacy had been interfered with substantiated and declared that the Department had engaged in conduct constituting interference with the privacy of Mr Rummery.

The Commissioner, however, also found that the disclosures were made to two staff at the Ombudsman's Office and that disclosures did not occur outside the confines of the investigating team and were not known more widely in that office or in the community. For those reasons, the Commissioner decided not to make a declaration as to compensation, although the Commissioner did declare that the Department should apologise to Mr Rummery for disclosing his personal information.

Section 52 of the *Privacy Act 1988* (Cth) provides that after investigating a complaint, the Commissioner may find the complaint substantiated and may make a declaration that the complainant is entitled to an amount of compensation for any loss or damage suffered by reason of the act or practice of the subject of the complaint. The loss or damage includes injury to the complainant's feelings or humiliation suffered

by the complainant. However, the Act does not provide further guidance as to when such a determination should be made, nor does it provide any further guidance as to how the amount of compensation is to be determined.

Section 61 of the Privacy Act provides that application may be made to the Tribunal for review of a decision refusing a declaration that a complainant is entitled to compensation. The issues for the Tribunal to determine in this case were whether there should be a declaration that Mr Rummery was entitled to compensation for the breach of his privacy and, if so, what the amount of compensation should be.

As there were no authorities relating to the Privacy Act that set out the principles in determining these issues, the Tribunal sought assistance from decisions which interpreted similar provisions in other legislation. Section 81 of the *Sex Discrimination Act 1984* (Cth), when first enacted, contained very similar provisions to those in section 52 of the Privacy Act. In *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, the Federal Court gave detailed consideration to the determination and assessment of compensation under section 81 of the Sex Discrimination Act and the Tribunal applied those principles in this case. The Tribunal adopted the view of French J, that once loss is proved there would need to be good reason shown as to why compensation for that loss should not be awarded. In this case, the Tribunal found that no such reason appears.

The Tribunal therefore found that Mr Rummery was entitled to an amount by way of compensation for the loss or damage suffered by him by reason of the breach of his privacy by the Department. In this case, the damage suffered was the injury to Mr Rummery's feelings and the humiliation that he suffered.

The Tribunal then considered the amount of compensation payable. Mr Rummery had claimed compensation of $200,000 on the basis that the breach of privacy caused him to cease his employment with the Department. There was no evidence before the Tribunal to enable it to make such a finding and it did not assess compensation on that basis.

The Tribunal noted that the Federal Court in *Hall v Sheiban* referred to the difficulty in assessing compensation, but stated that to ignore items of damage such as injury to feelings, distress and humiliation simply because of the difficulty in demonstrating the correctness of a particular figure would be to visit an injustice on the complainant. The Court adopted a statement of principle from an English racial discrimination case, *Alexander v Home Office* [1988] 1 WLR 968, that such awards should not be minimal, because this would trivialise or diminish respect for the public policy to which the Act gives effect. However, because it is impossible to assess the monetary value of injured feelings, awards should be restrained. The Federal Court also expressed the view that normally it would be appropriate to measure damages to be awarded under statutory provisions in accordance with the general principles of tort law, particularly if the rules applicable in tort did not conflict with the terms of the statute. The Tribunal found that there was no conflict between those principles and the provisions of section 52 of the Privacy Act and it assessed compensation in accordance with those principles.

The Tribunal then considered whether the award of compensation in this case should include a component of aggravated damages. Given subsection 52(1A) of the Privacy Act and having regard to the evidence before it, the Tribunal found that it was not appropriate to consider an award of aggravated damages. Although it disregarded this in assessing damages, the Tribunal noted the Department's persistence in maintaining that Mr Rummery's conduct was not bona fide and that the Department incurred substantial expense in maintaining that position before the Privacy Commissioner.

The Tribunal then considered how 'a specified amount' as required by paragraph 52(1)(iii) of the Privacy Act should be determined. The Tribunal considered awards of compensation under a number of statutory provisions, including awards of the Privacy Commissioner, most of which ranged from a few thousand dollars to approximately $20,000. It noted that the Department led evidence that the Privacy Commissioner had only made two awards of compensation in the sums of $1,000 and $2,500.

The Tribunal found that the breach of privacy was serious in Mr Rummery's eyes and it agreed that it was a serious breach. Taking all relevant factors into account, the Tribunal found that a restrained, but not minimal, award of compensation was $8,000.

Veterans' Affairs

Re Jebb and Repatriation Commission

[2005] AATA 470, 24 May 2005—
Deputy President DG Jarvis

This was an interlocutory decision concerning whether the Repatriation Commission was estopped from contending that the veteran's condition of diabetes mellitus was not war-caused. It deals with the issue of estoppel, equitable estoppel and *Anshun* estoppel in the Tribunal.

Mr Jebb was a veteran of the Vietnam war. In 1999 the Repatriation Commission accepted a claim by Mr Jebb that his condition of diabetes mellitus was war-caused, but rejected his claim that his ischaemic heart disease (IHD) was war-caused. In 2002, Mr Jebb lodged a further claim for pension in respect of IHD. The Commission rejected his claim and its decision was confirmed by the Veterans' Review Board (VRB). Mr Jebb then applied to the AAT for review of the rejection of his claim.

Statements of Principles (SoPs) made pursuant to the *Veterans' Entitlements Act 1988* (the VEA Act) list various factors which must as a minimum exist in order to raise a reasonable hypothesis connecting a medical condition suffered by a veteran with his or her war service. One of the factors in the SoP in respect of IHD, on which Mr Jebb relied in support of his 2002 claim, was that the veteran was suffering from diabetes mellitus before the clinical onset of IHD. After Mr Jebb's 2002 claim had been rejected by the Commission and by the VRB, the Commission raised for the first time a contention that Mr Jebb's diabetes mellitus was not caused by his war service on the grounds that he had not been involved in handling certain relevant herbicides.

Mr Jebb contended that the Commission was estopped from raising that contention because of its acceptance in 1999 that his diabetes mellitus was war-caused. The Commission disputed that it was stopped.

The Tribunal considered this question as a preliminary issue. It decided that in considering Mr Jebb's 2002 claim for IHD the Commission was not estopped by its earlier decision from determining whether his diabetes mellitus was war-caused.

The Tribunal considered the possible relevance of various kinds of estoppel.

It first addressed the doctrine of equitable estoppel, and decided that that doctrine did not apply. The Tribunal pointed out that it is a necessary element of that doctrine that there should be unconscionable conduct on the part of the representor entailing actual or constructive knowledge on the part of the representor that the representee would act, or abstain from acting, in reliance on an assumption or expectation induced by the representor. However, on the matters asserted by Mr Jebb, the Commission had not been guilty of any such unconscionable conduct.

The Tribunal further pointed out that the doctrine of estoppel could not permit action by a public official that was inconsistent with his or her statutory

obligations. The Tribunal considered that under the VEA Act, the determination of Mr Jebb's 2002 claim for IHD entailed considering the SoPs in force at the relevant time in respect of both IHD and diabetes mellitus. Even though an earlier claim for diabetes mellitus had been accepted by the Commission, the Act provided for the making of new SoPs in respect of medical conditions that would take into account later medical or scientific knowledge. If a new SoP were to be made in respect of diabetes mellitus, the issue of whether that condition was war-caused would have to be determined by reference to that new SoP, and the SoP in force at the time of the earlier decision might not necessarily apply.

The Tribunal said that in cases where the SoP extant at the time of an earlier decision was not materially different from the corresponding factor in a later SoP, the decision-maker determining a later claim based on the same condition would generally accept an earlier determination that the claimed condition was war-caused. However, the decision-maker would still be obliged to consider that issue; and if the decision-maker had become aware of relevant new information, he or she would not be estopped from considering it, and in appropriate circumstances, could make a different determination from the earlier determination.

The Tribunal further noted that under a different section of the VEA Act, the Commission was entitled, after taking into account any relevant new matter which was not before the Commission when its original decision to grant a pension was made, to review its original decision. This discretion existed irrespective of whether any other claim for a different but related condition had been made. Mr Jebb should not therefore have assumed that the acceptance in 1999 that his diabetes mellitus was war-caused would never be called into question. The Commission could not be estopped from exercising its statutory discretion to review Mr Jebb's pension for diabetes mellitus.

The Tribunal also referred to *Anshun* estoppel, whereby a party who has behaved unreasonably in not raising a matter in earlier proceedings is not permitted to raise that matter in later proceedings, except in certain special circumstances. The Tribunal decided that the fact that a party had not raised an issue before the Commission or the VRB would not give rise to *Anshun* estoppel. This was because reviews by the AAT involve a re-hearing of the relevant application, and the Tribunal determines applications on the material before it, and not on the material that was before the Commission or the VRB. Further, because of the procedures adopted by the Tribunal, it is able to investigate issues more thoroughly than can generally occur when the original decision was made, and *Anshun* estoppel would be inappropriate to restrain the Tribunal from carrying out its function of arriving at the correct or preferable decision.

The Tribunal also considered the doctrine of issue estoppel, and decided that this did not apply in the present matter for similar reasons. It decided further that as a general rule and in the absence of a contrary legislative provision, this doctrine would not apply even where the relevant earlier decision had been made by the AAT, as opposed to the Commission or the VRB.

Finally, the Tribunal directed that on the hearing of Mr Jebb's case, the parties could adduce such evidence as they may be advised in relation to the question of estoppel. This direction was made so that if the Federal Court, on any appeal from the Tribunal's ultimate decision on the merits of the claim, took a different view of the law relating to estoppel, the Federal Court would be in a position to determine for itself the Commission's contention as to estoppel, pursuant to the expanded powers conferred on that court by recent amendments to the *Administrative Appeals Tribunal Act 1975*.