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 Serong and Civil Aviation Safety Authority

[2006] AATA 1123; 22 December 2006

Mr E Fice, Member; Dr K Breen, Member

Whether the decision to refuse Mr Serong a class one medical certificate was the correct or preferable decision — Whether the conditions imposed on Mr Serong's class two medical certificate are necessary in the interests of air navigation safety

Mr Serong qualified for a commercial pilot licence in 1996. In April of that year, he developed type one (insulin dependent) diabetes mellitus which caused him to cease flying for a year. In 1997, the Civil Aviation Safety Authority (CASA) refused to renew Mr Serong's class one medical certificate which would have enabled him to fly commercially. CASA renewed his class two medical certificate but imposed a condition that he only fly as, or with, a safety pilot.

In 2006, Mr Serong applied for the renewal of his class two medical certificate and for the issue of a class one medical certificate. CASA issued the class two medical certificate subject to conditions, including that he only fly as, or with, a qualified co-pilot. The application for a class one medical certificate was refused. Mr Serong applied to the Tribunal for review of these decisions.

As Mr Serong suffers from type one diabetes which can only be controlled by insulin injection, he does not meet the medical standard under the *Civil Aviation Safety Regulations 1998* for the issue of a class one or a class two medical certificate. However, the Regulations confer a discretion on CASA to issue a medical certificate to a person who does not meet the medical standard if he or she is not likely to endanger the safety of air navigation. The certificate may be issued subject to any condition that is necessary in the interests of the safety of air navigation.

CASA developed a policy that class two medical certificates may be issued to type one diabetics whose diabetes is well-controlled but subject to conditions which include the requirement for a co-pilot. CASA submitted that its policy is consistent with the prevailing approaches of regulatory bodies internationally and should be adopted by the Tribunal.

The Tribunal examined the medical evidence regarding the problems posed by type one diabetes on aviators and found that the most significant problem is hypoglycaemia, a severe lowering of the blood sugar levels. The onset of hypoglycaemia can be subtle and difficult for the diabetic to detect and can lead to impaired decision-making, disorientation, poor performance and incognisance of skills, confusion and unconsciousness.

CASA submitted that, in considering the likely risk to the safety of air navigation, the Tribunal could not be satisfied that Mr Serong would always recognise the symptoms of the onset of hypoglycaemia or be in a position to respond to any perceived symptoms when airborne. The Tribunal held that demanding a zero risk that Mr Serong would suffer a hypoglycaemic event likely to endanger the safety of air navigation was too high a standard.

The Tribunal reviewed research relating to hypoglycaemia. It also considered the experience of the United States Federal Aviation Administration (FAA) in relation to a protocol which provides for type one diabetics to be granted medical certificates authorising solo flights in respect of student, recreation or private pilot licences. The FAA found that, since the protocol was established in 1996, persons issued with medical certificates under the protocol had been involved in five accidents or incidents but that none were attributable to their diabetes. The Tribunal observed that the experience of the FAA establishes that the risk of type one diabetics becoming incapacitated due to hypoglycaemia can be reduced to an acceptable level by implementing measures such as strict preliminary screening and

imposing strict conditions on the operation of aircraft, including testing of blood glucose levels before and during flight and carrying amounts of rapidly absorbable glucose. The Tribunal held that the FAA protocol was no longer experimental and that its safety had been adequately demonstrated.

On the evidence before it, the Tribunal was satisfied that Mr Serong's diabetes was well-controlled and that he met the requirements for certification under the FAA protocol.

The Tribunal decided to vary the decision relating to the conditions imposed on Mr Serong's class two medical certificate. The Tribunal held that it is unnecessary for Mr Serong to fly as, or with, a qualified co-pilot when he engages in day flying under the visual flight rules on flights not exceeding three hours. The Tribunal imposed additional conditions on the medical certificate in relation to solo flights, including requirements that Mr Serong carry readily absorbable glucose and that he monitor his glucose level before and during flight.

In relation to the decision not to issue Mr Serong a class one medical certificate, the Tribunal noted that there was insufficient material before it regarding air operations by an insulin dependent diabetic in commercial operations to make a proper assessment of conditions which would attach to such a certificate to ensure the safety of air navigation. The Tribunal affirmed the decision not to issue a class one medical certificate.

Environment

Re The Wildlife Protection Association of Australia and Minister for the Environment and Heritage & Ors

[2006] AATA 953; 10 November 2006

Deputy President PE Hack SC; Dr EK Christie, Member; Dr TJ Hawcroft, Member

Whether wildlife trade management plans relating to Bennett's wallabies and Tasmanian pademelons on Flinders Island and King Island, Tasmania should have been approved — Whether appropriate consideration given to the likely impact of commercial hunting on the species

In November 2005, the then Minister for the Environment and Heritage declared that two wildlife trade management plans were approved for the purposes of s 303FO of the *Environment Protection and Biodiversity Conservation Act 1999*. The management plans related to the commercial culling of Bennett's wallabies and Tasmanian pademelons on Flinders Island and Bennett's wallabies on King Island. The decisions imposed a framework for commercial harvesting in the context of the export of products from these animals to overseas markets.

The Wildlife Protection Association applied for review of the decision to approve the plans. The Australian Wildlife Protection Council Inc, Animals Australia and Flinders Council were joined as parties.

The issues to be determined by the Tribunal were:

1. whether the management plans permit the hunting of wallabies and pademelons in an inhumane manner;
2. whether the quotas adopted by the management plans were based upon data that is erroneous, inaccurate or misleading; and
3. whether the management plans should include further measures to monitor the effect of harvesting so that it is ecologically sustainable.

Humane killing

To approve a wildlife trade management plan, the Minister, and the Tribunal on review, must be satisfied that the management plans are consistent with the objects set out in s 303BA of the Act which include promoting the humane treatment of wildlife. Both management plans require that wallabies be taken in accordance with the requirements of the Animal Welfare Standard for the Hunting of Wallabies in Tasmania made under the *Animal Welfare Act 1993* (Tas). The Standard sets targets for the "Recommended Minimum Requirements" for shooting with rifles and also requires that injured animals be despatched quickly and humanely and that females killed be examined for young

which are to be humanely killed without delay. The management plans set out additional requirements designed to ban the use of shotguns and/or dogs by commercial shooters and to ensure that all holders of commercial wallaby hunting permits are appropriately trained and accredited.

The Wildlife Protection Association argued that the management plans should not permit the use of .22 rimfire ammunition. Two experts agreed, however, that .22 rimfire ammunition was appropriate for distances up to 50 metres as stipulated in the Welfare Standard. Evidence before the Tribunal was that nearly all wallabies harvested were shot at a range of no more than 50 metres. Additionally, commercial shooters were required to undertake a Certificate Course in Meat Processing which involved field shooting assessments designed to ensure that only proficient hunters are accredited. The Tribunal was satisfied that the use of .22 rimfire ammunition would not lead to inhumane outcomes for the animals.

Quotas

The quota-setting mechanism set out in the management plans operates on the basis of population density: that is, number of animals per square kilometre. Population densities, rather than counts of actual size, are used because of the environmental characteristics of the islands and the nocturnal behaviour of the species. Monitoring is undertaken through a system of spotlight survey counts performed bi-annually across parts of the islands where animals are harvested.

Annual quotas are determined on the basis of the population density estimates and the figures for non-commercial harvesting. The management plans operate on the basis of a range of "trigger points". For example, if the population density for Bennett's wallabies is above 40 per km^2 and the non-commercial quotas have been set at 4,000 animals, the commercial quota would be no higher than 11,000 animals. Commercial harvesting would cease for densities lower than 10 per km^2.

The Wildlife Protection Association challenged the reliability of the population density data. It claimed that the quota was based on erroneous, inaccurate or misleading data which has overstated the number of wallabies and pademelons such that the Minister could not be satisfied that the impact on the species is ecologically sustainable. Having considered the expert evidence on this issue, the Tribunal was satisfied that there had been appropriate consideration of the likely impacts that the proposed commercial harvesting would have on the animal populations.

Future monitoring methods

During the course of the hearing, the Tribunal raised with witnesses for the Minister whether it was desirable or necessary that some additional monitoring of harvesting be undertaken, particularly in relation to the gathering of statistics of age/sex class ratio. One of the objects of Part 13A of the Act is to ensure that any commercial utilisation of Australian wildlife for the purpose of export is done in an ecologically sustainable way. Further, the decision-maker must be satisfied that the management plans monitor the environmental impact of the activities covered by the plans.

Expert evidence indicated that attention should be paid to population demographics to ensure that, for example, the adult male population was not being selectively taken out. The age/sex characteristics had not been incorporated into the management plans because of the difficulty in recording the numbers while spotlighting. It was acknowledged by expert witnesses that the recording of these characteristics could be done at the abattoir or that other measures could readily be taken to obtain that data.

The Tribunal varied the decisions under review to include a requirement in each management plan that the sex and an estimate of age of all harvested animals be recorded. The Tribunal was otherwise satisfied that the measures included within the plans were adequate to monitor the wallaby and pademelon populations and the safeguards within the plans meant that no single decision could render the commercial harvesting of those animals a threat to the species.

Insurance and superannuation regulation

Re VBN and Ors and Australian Prudential Regulation Authority

[2006] AATA 710; 25 July 2007

Deputy President SA Forgie; Senior Member BH Pascoe

Whether Trustee of a superannuation fund breached covenants in the Superannuation Industry (Supervision) Act 1993 *– Whether disqualified directors were fit and proper persons*

The Board of the Trustee of the AXA Superannuation Fund (Fund) had nine directors. Four were nominated by the employer, AXA Australia (AXA), and four by the employee members. The ninth was the chairman. The Australian Prudential Regulation Authority (APRA) disqualified seven of the directors on the basis that they were directors when the Trustee contravened ss 52(2)(b), (c) and (g) of the *Superannuation Industry (Supervision) Act 1993*. It also disqualified two of those seven on the further ground that they had conflicts of interest and were not fit and proper persons to be responsible officers of a body corporate that is a trustee.

The Tribunal decided that the Act cannot be regarded as a codification or restatement of the previous law relating to regulated superannuation funds. It changed, modified or complemented some of the existing law. In relation to all seven directors, the Tribunal had first to decide whether the Trustee had contravened all or any of the covenants which are found in ss 52(2)(b), (c) and (g) of the Act and which are deemed by that section to form part of the Fund's governing rules. Only if the Trustee was in breach did it become relevant to consider whether the nature and seriousness of the contraventions was such that the directors should be disqualified.

Whether Trustee contravened any covenants

The Trustee managed a fund with three categories of membership: defined benefit members, deferred benefit members and accumulation members. Membership of the first category is closed and so is diminishing. Deferred benefit members are those who have left the employ of AXA but who have chosen to leave their contributions in the Fund. The membership of that category is growing. Accumulation members are those who became employees of AXA after 1 April 2001. The members made contributions to the Fund. Their amounts varied according to the category of membership and were regulated by the Trust Deed. The Trust Deed also provided for AXA to make contributions to the Fund from time to time.

In managing the Fund, the Trustee was required to comply with the Trust Deed and with the Act. As part of its management, it had to decide a crediting rate policy for the Fund. The Trustee had a crediting rate policy before 1 July 1998. It comprised an interest rate reserve, a minimum crediting rate and the Trustee's discretion to smooth returns while maintaining a reasonable interest rate reserve position and crediting the minimum return. The result had been to credit less than the Fund's earnings to its members but that had been necessary to remove a "negative" interest rate reserve that had arisen due to high crediting rates in the late 1980s and early 1990s. As a consequence, new members subsidised high crediting rates given to previous generations of members. The Trustee sought actuarial advice. The actuarial advice was, in summary, that it adopt a policy of declaring a crediting rate based on a three year compound average of the Fund's returns with a minimum of the lesser of 50 per cent of the net case rates and 50 per cent of the net 10-year bond yields. This was the policy adopted by the Trustee but an increase in the number of deferred benefit members and of younger members in that category meant that it was difficult to assess the future cost of providing their entitlements. The cost of funding the Fund's benefits had not been costed on the basis of there being so many members. Further actuarial advice was to the effect that the crediting rate policy could result in a high degree of smoothing and effectively assumed sufficient reserves were available. The policies also gave deferred benefit members some scope to choose when to withdraw their benefit from the Fund.

The Trustee was also aware that AXA had asked for actuarial advice to consider the scope of its contributions in light of the Plan's then surplus and that the Chief Executive

Officer of AXA was anxious for the interest rate question to be resolved followed by an examination of pension factors. The actuary had earlier recommended that, while the Fund was then in a satisfactory financial position, AXA should recommence contributions no later than 1 July 2001 and that the matter should be monitored in the meantime. On the advice of the actuary, the Trustee decided to recoup the previously occurring over-crediting of interest over the following three years. After that, a new crediting rate policy would be developed based on actuarial advice, the Fund's earning rate and the level of the then crediting rate reserve. Just as the Trustee had advised the members of its previous decisions, the Trustee notified the members of its decision.

Some deferred benefit members complained to APRA that the change in crediting rate policy had been made retrospectively and deprived members in their category of their proper entitlements. The Tribunal decided that the Trustee's decision needed to be viewed in light of the best interests of all of the members of the Fund. When viewed in that way, the Trustee had not contravened any of the covenants.

AXA had decided to make an offer to deferred benefit members to encourage them to take a lump sum rather than a pension. Members who withdrew a lump sum would be offered a 5 per cent enhancement to that part of their account balances that could be converted to a pension and 100 per cent of the balance. The Trustee considered whether the offer detrimentally affected other Fund members and whether it could be legally implemented under the Trust Deed. AXA and the Trustee were aware that the valuation basis adopted for the last actuarial investigation for the Fund had valued the pension conversion option at 128 per cent of the members' account balances for those exercising the option at age 55 years or approximately 120 per cent for those exercising it at 65. The Trustee advised the members of AXA's offer but made no reference to the approximate valuations.

The Tribunal decided that the Trustee had given adequate information to the members regarding the value of their pension options. The Trustee had told the members that they needed to take account of their own personal circumstances and plans. The Tribunal considered that this was appropriate and that it would have been inappropriate for the Trustee to attempt to give the members guidance as to what they should do when their members' circumstances and plans, and so the value to them of a pension, could not be known to it.

As the Trustee was not in breach of the covenants, the Tribunal set aside the decisions to disqualify five of the seven directors.

Whether two of the seven directors were fit and proper persons

The role of two of the employer nominated directors in the affairs of the Fund led to APRA's decision that they should be disqualified on the basis that they were not fit and proper persons to be responsible officers of a body corporate that is a trustee. The issues concerned their involvement in the development of AXA's offer to the Fund's deferred benefit members. Their involvement was known to the other directors and the Tribunal found that neither had attempted to influence the Trustee's considerations. Both held senior positions in AXA. In the case of one director, it was reasonable to expect that he would be involved in the development of its offer to the deferred benefit members. After all, decisions affecting the Fund could have significant financial implications for the employer. In relation to both directors, the Tribunal found that it was well understood that all of the directors, including these two, would bring their experience in the employ of the employer and otherwise to their positions with the Trustee.

As a consequence of its conclusions, the Tribunal decided that there was no basis on which to conclude that the remaining two directors were not fit and proper persons to be responsible officers of a body corporate that is a trustee. APRA's decisions to disqualify the directors were set aside.

Maritime safety

Re Fleet Management Limited and Australian Maritime Safety Authority

[2007] AATA 56; 14 February 2007
Senior Member JW Constance

Whether defects rendered ships unseaworthy — Whether compliance under Port State control and Flag State control inspections

In August 2005, two international trading ships operated by Fleet Management Limited (Fleet Management) were separately detained in Australian ports by the Australian Maritime Safety Authority (AMSA). The ships were the *MV Noble Dragon* and the *MV Afric Star*. Each ship was detained on the basis that it appeared to be unseaworthy, each having several defects.

Fleet Management sought to have the decisions to detain the ships set aside.

Under the international regime governing merchant shipping, a ship is registered under a particular flag and is subject to that country's safety requirements. It is also subject to Port State control which means that, once it enters a port of another country, it is subject to the inspection regime of that country to determine whether it substantially complies with certificates issued by the Flag State concerning the condition of the ship or its equipment.

Pursuant to s 210 of the *Navigation Act 1912*, AMSA may order the provisional detention of a ship that appears to be unseaworthy. In this event, notice is given to the master of the ship and a report is prepared. A survey is carried out if necessary. On receipt of the report, AMSA may order that the ship be finally detained.

The critical issue to be determined by the Tribunal in this case was whether the defects found on the ships were sufficient to allow AMSA to detain them. In relation to the *MV Noble Dragon*, the Tribunal was also required to determine whether the detention order was served unnecessarily.

The evidence before the Tribunal was that a marine surveyor employed by AMSA had boarded and inspected the *MV Noble Dragon*. He noted that the ship's radio was not working properly. This deficiency was not noted in the certificates produced by the master of the ship to the surveyor. After further testing and failed attempts at fixing the radio, the surveyor issued the detention order. The Tribunal found that the absence of a fully functioning radio system would have placed the crew at risk in the event of an emergency. As such, this defect was sufficient for a determination that the ship was unseaworthy.

The Tribunal found that a facsimile from the ship's Flag State granting a dispensation from the requirement to carry a working radio was sighted by the surveyor only after the order was served. The order was therefore not given unnecessarily.

In relation to the *MV Afric Star*, the evidence was that the surveyor found three relevant defects: a corroded hole in the garbage chute, damaged guard rails and a general failure of the Safety Management System. The Tribunal found that the construction of the chute would not prevent the entry of water into the ship and that the deficiency compromised the ship's watertight integrity. In relation to the guardrails, the Tribunal found they were severely corroded and broken in places representing a very clear risk to the safety of the crew. The Tribunal also found that the Safety Management System in force at the time was inadequate. Each of these defects alone provided sufficient basis for detention.

The Tribunal affirmed the decisions to detain the ships.

Practice and procedure

Re The Taxpayer and Commissioner of Taxation

[2006] AATA 598; 5 July 2006
Member S Webb

Whether the Tribunal should grant the Taxpayer's request for an order under s 38 of the Administrative Appeals Tribunal Act 1975 *that the Commissioner provide an additional statement of reasons containing further and better particulars*

The Taxpayer claimed tax deductions for legal expenses in relation to certain leases. His claims were rejected by the Commissioner of Taxation and penalties were imposed. The Taxpayer lodged an objection to the assessment. On review, the Commissioner affirmed the assessment but decided to reduce the penalties previously imposed. The Taxpayer applied for review of the Commissioner's decision.

The Commissioner lodged a statement of reasons for the reviewable decision and other documents pursuant to s 37 of the *Administrative Appeals Tribunal Act 1975* (Administrative Appeals Tribunal Act). The Taxpayer asserted that the statement of reasons was inadequate and requested that the Tribunal order the Commissioner to provide an additional statement containing further and better particulars under s 38 of the Administrative Appeals Tribunal Act. The Tribunal may make such an order if it is satisfied that the statement lodged does not contain adequate particulars of factual findings, adequate reference to the evidence or other material on which the findings were based or adequate particulars of the reasons for the decision.

The Tribunal found that the Commissioner's statement of reasons did not contain sufficient particulars to expose the reasoning process clearly and granted the order. The additional statement was duly lodged by the Commissioner. The Taxpayer was not satisfied and sought an order that the Commissioner provide a third statement containing further and better particulars.

Tribunal's power to require an additional statement containing further and better particulars

Pursuant to s 37(1) of the Administrative Appeals Tribunal Act, a decision-maker must lodge a statement that sets out its findings on material questions of fact, refers to the evidence or other material on which those findings were based and gives the reasons for the decision. Section 14ZZF of the *Taxation Administration Act 1953* (Taxation Administration Act) modifies this requirement in relation to applications for review of taxation decisions. The Commissioner is required to provide "a statement of reasons for the decision". The Commissioner contended that the modified s 37(1) imposes a less onerous obligation on the Commissioner than would otherwise apply. The Tribunal does not have the power to order the Commissioner to lodge an additional statement in the terms contemplated by that subsection.

The Tribunal held that the Commissioner's statement of reasons must set out the actual reasons for the decision in a manner intelligible to a reasonable lay person. For that purpose it is necessary to expose the reasoning process in relation to each of the substantive issues. The reasoning process will be exposed if, in relation to each issue, the applicable law or standard is identified, any relevant findings of fact are set out with reference to the material on which those findings are made, and the conclusions reached are explained by applying the facts to the relevant law or standard. If it is not possible to understand the reasons for a decision without particulars of the factual findings and the evidence being set out, or without the particulars of the reasons for the decision being clearly explicated, then the reasons may be found to be inadequate. The Tribunal concluded that it may order an additional statement setting out further and better particulars of this kind if the essential precondition of inadequacy exists.

The Tribunal recognised that it is an important principle of natural justice for a taxpayer to be adequately informed of the matters that gave rise to the Commissioner's decision when preparing his or her case. That is especially so because the taxpayer bears the burden of proof set out in s 14ZZK of the Taxation Administration Act. Furthermore, it is important that the Tribunal properly apprehends the issues for determination and the matters about which it is to be satisfied, including all the relevant factors, when making a decision. An adequate statement of reasons for the objection decision may assist the Tribunal in that regard.

Whether the Tribunal should order the Commissioner to provide a further additional statement of reasons

The Tribunal examined the additional statement provided by the Commissioner and held that it contained further and better particulars sufficient to convey the reasons for the decision. Deficiencies in the statement were not found to render the statement unintelligible to a reasonable lay person. The Tribunal stated that the deficiencies in the statement would be a matter for evidence. It was noted that the Taxpayer's concerns could be addressed by directions concerning the future conduct of the review.

The Tribunal held that the deficiencies in the Commissioner's statement did not render it inadequate, and therefore the discretionary power was not enlivened. The Tribunal observed that, even if the order was granted, it would not be likely to advance fairness or justice in the proceedings, but would instead be productive of delay and further disputation over issues that could be more appropriately dealt with by directions, or by evidence and submissions in the substantive hearing.

The Tribunal held that it was not appropriate to exercise the discretion in s 38 of the Administrative Appeals Tribunal Act.

Social security

Re VCG and Secretary, Department of Employment and Workplace Relations

[2006] AATA 956; 10 November 2006
Deputy President SA Forgie

Whether the applicant is to be treated as a member of a couple in a marriage-like relationship — Relevance of a person being homosexual

Since 22 November 2002, the applicant was qualified for and received a disability support pension under the *Social Security Act 1991*. She was paid at the single rate rather than at the lower rate applicable to a member of a couple. Circumstances in which a person is regarded as a member of a couple under the Act include those where the relationship between that person and another is a "marriage-like relationship". In deciding whether a person is in a marriage-like relationship, s 4(3) requires that regard be had to certain criteria.

Centrelink decided that the applicant had been a member of couple with Anthony since 8 April 2004 and decided to raise and recover a debt of $12,497.02.

The applicant and Anthony are not married. They had known each other for two to three years before Anthony moved to the applicant's home address. The applicant lives in the house with her daughter and pays their living expenses. Anthony, who is homosexual, lives in a converted garage at the rear of the house. He carries out work around the house and garden in return for rent-free accommodation.

For a short period while the applicant was incapacitated, Anthony received a carer allowance and assisted her by picking up her children from school, driving her to medical appointments, cleaning and washing dishes. Occasionally, he has assisted the children with their homework. They do not have a sexual relationship and Anthony looks to people other than the applicant to meet his emotional needs. The applicant regards Anthony as a great friend who gives her peace of mind and who has helped her and her children. Their living arrangements are likely to continue as long as she owns the home property.

The applicant and her ex-husband previously owned the home jointly. Anthony guaranteed a loan which enabled the applicant to borrow the necessary money to buy her ex-husband's share. At the insistence of the lending institution, she and Anthony became the owners of the property as tenants in common. He held a 1/20th share and she the remainder. The applicant and Anthony also invested in two properties together and, in order to secure the necessary loans, offered the security of the home property and opened joint bank accounts.

The Tribunal analysed what is meant by the term "marriage-like relationship". It considered what is meant by a marriage under the *Marriage Act 1961* and the Constitution, noting that the courts have rejected the argument that one of the principal purposes

of marriage is the procreation of children. The courts have made observations regarding some move in the community towards regarding marriage as a voluntary union for life between two people to the exclusion of all others rather than as such a union just between a man and a woman. The Tribunal went on to consider how marriage is regarded in literature and in religious texts drawn from four of the large number of faiths followed in Australia: Christianity, Islam, Judaism and Hinduism.

The Tribunal noted that many of the indicia of a marriage are also the indicia of friends who have loyalty and affection for each other and who show support for each other in tangible and intangible ways. They may pool their resources in much the same way that students pool their resources in order to minimise their living costs and to achieve a standard of living that a person living alone could not achieve. A friendship, however close, the Tribunal found, is not marriage-like. It has none of the more ephemeral characteristics including, for example, aspects of sanctification and spirituality, a sense of union or joinder, a sense of common purpose and a sense of walking through life's journey together. The bond between friends has room for others but it will not have the spiritual significance that the religious persons in many cultures attach to marriage. Friends may well have commitment and common understanding but they will generally be circumscribed by matters such as circumstances, events or time. A marriage is not circumscribed in that way.

The Tribunal observed that the Act requires regard to be had to the many and varied notions of marriage that abound in Australian society. There is no one formula encompassing all of these notions. The Tribunal also noted that a person may be in a marriage-like relationship with a woman even if the marriage is not consummated and there is no prospect that it will be. Consummation, or the inclination to consummate, is only one factor in determining the quality of the relationship.

The Tribunal concluded that the friendship between the applicant and Anthony was one of strong commitment but that it did not have the sense of union or common purpose inherent in a marriage or in something resembling or typical of marriage. It had neither a physical or spiritual bonding nor any sense of union transcending particular activities or enterprises. The arrangement suited both of them and would continue while that was the case. As it was not a marriage-like relationship, the Tribunal decided that the applicant had not been overpaid disability support pension.

Taxation

Re Debonne Holdings Pty Limited and Commissioner of Taxation

[2006] AATA 886; 19 October 2006
Justice GK Downes, President

Whether a contract for the sale of land as part of an arrangement to purchase a hotel business involves the supply of a going concern

In 2002, Debonne Holdings Pty Limited (Debonne Holdings) acquired the Bassendean Hotel. There were separate but interdependent contracts for the sale of the business and the land. Both contracts required simultaneous settlement. The business sale contract expressly provided that it was the supply of a going concern. The land sale contract provided that the purchase price included any GST liability of the vendor.

In its Business Activity Statement, Debonne Holdings claimed the land component of the purchase as a creditable acquisition entitling it to input tax credits. The Commissioner assessed that both the business and land contracts involved the supply of a going concern and, therefore, were GST-free. Debonne Holdings sought review of that decision. The question for the Tribunal was whether the land sale involved the supply of a going concern.

The *A New Tax System (Goods and Services Tax) Act 1999* provides that the supply of a going concern is GST-free if the supply is for consideration, the supply is to a recipient registered or required to be registered under the Act and "the supplier and recipient have agreed in writing that the supply is of a going

concern" (s 38-325(1)). The phrase "supply of a going concern" is defined in s 38-325(2) to include the requirement that the supplier supply "all of the things that are necessary for the continued operation of an enterprise".

Debonne Holdings argued that there were two contracts which, although providing for simultaneous settlement, were separate. It followed that the GST provision in the business sale contract operated only with respect to the subject matter of that contract and not the land sale. The Commissioner argued that, although there were two contracts, there was only one transaction and the provisions of both contracts should be brought to bear on the whole transaction. As such, the express provision relating to a "going concern" in the business sale contract governed both contracts.

The Tribunal held that the enterprise in this case, the business of the Bassendean Hotel, required the sale of the land on which the hotel was situated as one of the things necessary for its continued operation. The relevant going concern for the purposes of the Act was, accordingly, both the business and the land on which it was situated. Further, the parties' use of the phrase "going concern" in the business sale contract constituted agreement in writing (s 38-325(1)) and that agreement related to the whole of the subject matter of the sale: that is, the business and the land on which it was situated.

The Tribunal upheld the Commissioner's decision that Debonne Holdings was not entitled to input tax credits on the land sale.

Textiles, clothing and footwear

Re The Victoria Carpet Company Pty Limited and Secretary, Department of Industry, Tourism and Resources

[2007] AATA 1424; 12 June 2007
Senior Member GD Friedman

Whether displays of carpet samples placed by a manufacturer in retail stores constitute in-store promotions

In April 2005, a scheme for promoting the Australian textiles, clothing and footwear industry came into effect. The scheme provides incentives to promote investment and innovation in the industry. Pursuant to the scheme, brand support expenditure consisting of in-store promotions is an activity eligible for a grant dealing with capital investment expenditure.

The Victorian Carpet Company Pty Limited applied for a grant for activities related to the display in retail stores of carpet samples in sample books and in layers on stands. The displays remain in stores for lengthy periods and are sometimes updated as new carpet products become available. The Department refused the application for a grant on the basis that the displays were not in-store promotions.

Before the Tribunal, the company argued that in-store brand support activities maximise opportunities to inform customers of the attributes of the products. It stated that displays in retail stores and the ability to take carpet samples home represent the most effective means of persuading customers to purchase the products. The company maintained that the displays are brand support, and the scheme does not require in-store promotions to be one-off, short-term events.

The Tribunal noted that the term *promotion* is not defined in the scheme and held that it should be given its ordinary meaning in the context of the scheme. The Tribunal concluded that the term refers to an investment activity carried out in a store involving the publicising of one product over another through marketing or advertising initiatives beyond the provision of stock or samples. Examples might include a marketing campaign in a particular location or a time-limited activity designed to advance the sales of individual products.

The Tribunal found that the company's permanent displays and sample books are provided for the information of customers as a guide to the range of available products. There is no specific publicity, advertising or marketing campaign, or other activity such as special offers or inducements that would encourage a customer to prefer the company's carpet to a competitor's. The Tribunal held that the

company's activities were normal offerings of its products for sale and were not in-store promotions. The decision under review was affirmed.

Veterans' affairs

Re Cmielewski and Repatriation Commission

[2006] AATA 1063; 11 December 2006
Deputy President DG Jarvis

Whether a Polish veteran who was a member of two underground resistance groups in World War II had rendered qualifying service as an allied veteran for the purposes of the Veterans' Entitlements Act 1986

Mr Aleksander Cmielewski joined an underground resistance group during the German occupation of Poland in World War II. Following the German invasion, the Polish Government fled to Paris and later, in July 1940, to London. The Polish Government in London, known as the "government-in-exile", then operated from London until the end of World War II. This government was recognised by Australia as the legitimate government of Poland during the war.

The underground resistance group that Mr Cmielewski joined was called the Narodowe Sily Zbrojne (NSZ) or National Armed Forces. In about May 1944, after being warned that he was about to be arrested by the Gestapo, Mr Cmielewski left the town where he was living and fled to the mountains, where he joined the NSZ armed forces. Later in 1944, members of the NSZ based in the area of the Holy Cross Mountains, including Mr Cmielewski, amalgamated to form another force known as the Holy Cross Brigade (HCB).

The issue for the Tribunal was whether Mr Cmielewski was an allied veteran who had rendered qualifying service as a member of a defence force established by an allied country, pursuant to s 7A of the *Veterans' Entitlements Act 1986*.

The Repatriation Commission had previously accepted that persons who had fought with the largest resistance group in Poland were allied veterans and entitled to benefits under the Act. Mr Cmielewski's claim was rejected on the basis that neither the NSZ nor the HCB was a "defence force established by an allied country" within the meaning of the definition of that expression in s 5C(3) of the Act.

In considering the proper interpretation of the above expression, the Tribunal noted that, during a period when the government of an allied country is in exile, its ability to "establish" a defence force (or some part of it) is of necessity greatly curtailed.

The Tribunal decided that this situation should be taken into account in interpreting the legislation, and as a result, the expression "defence force established by an allied country" should be interpreted so as to extend beyond the regular or official defence force of a country. It should include forces set up or founded by an allied country, and also forces sanctioned, recognised or supported by an allied country, in circumstances where the government of that allied country was in exile.

The Tribunal then considered historical evidence as to the formation of the NSZ and the HCB. This indicated that the NSZ was a merged organisation that included members of a pre-war nationalist association, and numbered around 75,000 members. By the time the NSZ had been formed, it had established and developed relations with the Polish government-in-exile in London. There was evidence that the Polish government-in-exile was involved in reorganising the NSZ, in giving it a regular army structure, in providing support and arms and in maintaining contact with its commanders. As a result, the NSZ gathered intelligence and passed on this information to the Polish government-in-exile, either directly or via the Polish Home Army. Members of the NSZ also fought alongside the Home Army during the Warsaw Uprising in late 1944. Consequently, the Tribunal found that the NSZ was a defence force established by the Polish government-in-exile.

As to the HCB, the Tribunal was satisfied that it was sanctioned, recognised and supported by the Polish government-in-exile, and therefore could be said to have been "established" by it. This finding was based on evidence that the HCB had received some

assistance from the Polish government-in-exile, and on occasions carried out its orders and joined in, or cooperated with, the actions of the Home Army. The HCB also embarked on a long march to join other allied forces on the orders, or with the support, of the Polish government-in-exile.

The Tribunal set aside the decision under review and decided that Mr Cmielewski had rendered qualifying service during the periods when he was a member of the NSZ and HCB.

Re Roncevich and Repatriation Commission

[2006] AATA 660; 26 July 2006

Justice GK Downes, President; Deputy President PE Hack SC; C Ermert, Member

Whether a knee injury following a fall while stationed at a military barracks was "defence-caused"

Jure Roncevich served in the Australian Regular Army from 1974 to 1998. In February 1986, he attended a function in the Sergeants' Mess of the Holsworthy Military Barracks. When he returned to his room he was affected by alcohol. He fell from his window and injured his left knee. He returned to full duties later in the year.

In 1997, Mr Roncevich applied for a disability pension based, in part, on problems with his left knee. The Repatriation Commission rejected his claim and this decision was affirmed by the Veterans' Review Board.

Mr Roncevich lodged an application with the Tribunal which affirmed the decision under review. On appeal, the Tribunal's decision was set aside by consent and remitted to the Tribunal for re-hearing. A second Tribunal also affirmed the decision to reject Mr Roncevich's claim for a pension. Appeals to a single judge of the Federal Court and a Full Court of the Federal Court were dismissed. Mr Roncevich obtained special leave to appeal to the High Court which allowed the appeal and remitted the matter to the Tribunal to be determined according to law.

Whether the injury was defence-caused

By virtue of s 70(5)(a) of the *Veterans' Entitlements Act 1986*, an injury is taken to be a defence-caused injury if it "arose out of, or was attributable to, any defence service" of a member. The Repatriation Commission argued that there was no order requiring Mr Roncevich to attend the Sergeants' Mess and no requirement that he drink the amount of beer that he did. The Tribunal was satisfied that there was a function at the mess on the evening in question and that Mr Roncevich, as a living-in Senior Non Commissioned Officer, was expected to attend. The Tribunal also accepted that while Mr Roncevich was not required, as a matter of duty, to drink to the state where his faculties were impaired, there was an expectation that he would drink and would "keep pace" with his Regimental Sergeant Major, who at that time "drank at a rapid rate". The Tribunal held that the fall and the resulting injury were attributable to defence service within s 70(5)(a) of the Act.

Nature and diagnosis of knee injury and connection with service

Based on the medical evidence before it, the Tribunal accepted that between the time of the accident and the time of his claim for a pension, the veteran suffered from three pathologies: a torn lateral meniscus, a degenerative tear of the medial meniscus and a chronic anterior cruciate ligament tear. Each of these pathologies was found to satisfy the definition of "internal derangement of the knee" in the relevant Statement of Principles, No 60 of 1997. Those pathologies had not resolved by the time of the claim in 1997.

The Commission argued that the Tribunal could not be satisfied of the connection between the internal knee derangement and Mr Roncevich's defence service. Paragraph 5 of the relevant Statement of Principles identifies two factors that must exist before it can be said that the internal derangement of the knee is connected with service:

(1) the trauma or injury occurred within the six months immediately before the clinical onset of the internal derangement; and

(2) pain and swelling occurred within the two hours immediately following and as a result of the trauma or injury.

The Tribunal was satisfied that Mr Roncevich experienced pain and swelling within two

hours immediately following the fall from the window. The Tribunal further found that clinical onset of one of the pathologies was detected within six months of the trauma and this was sufficient for the injury to be defence-caused. The Tribunal rejected the Commission's argument that the pathologies should be considered separately for the purpose of the Statement of Principles and held that it was irrelevant that only one of those pathologies was the principal cause of present symptoms.

The Tribunal set aside the Commission's decision and remitted the matter for assessment.

Workers' compensation

Re Kennedy and Military Rehabilitation and Compensation Commission

[2007] AATA 19; 15 January 2007

Deputy President SD Hotop; Dr PA Staer, Member

Whether a Special Action Force Allowance should continue to be taken into account in determining weekly compensation payments to a former Special Air Service Regiment soldier

Mr Kennedy served in the Australian Army from 1984 until 1992. He was a member of the Special Air Service Regiment from June 1987 until his discharge. As a member of the Special Air Service Regiment, he received the Special Action Force Allowance in addition to his standard Army pay. Mr Kennedy suffered various injuries in the course of, or arising out of, his Army service and was voluntarily discharged from the Army in 1992 because of medical unfitness.

Mr Kennedy claimed and was paid weekly incapacity payments under s 19 of the *Safety, Rehabilitation and Compensation Act 1988* in respect of his injuries. Section 19 prescribes the method of calculating the amount of compensation payable to the employee each week. One factor in these calculations is the employee's "normal weekly earnings". Section 8 of the Act provides for the calculation of "normal weekly earnings" under a formula whose components include any allowance payable to the employee.

Pursuant to s 8(1) of the Act, Mr Kennedy's Special Action Force Allowance payments were included when calculating his "normal weekly earnings" for the purposes of calculating his incapacity entitlement. However, s 8(10) of the Act operates to impose a limitation on incapacity payments to ensure that the employee is not placed in a more advantageous position during the period of incapacity than he or she was in before becoming incapacitated for work. In September 2000, the Military Rehabilitation and Compensation Commission determined that Mr Kennedy would only have been employed in the Special Air Service Regiment, and therefore eligible to receive the Special Action Force Allowance, within a 14 year period from the time he first commenced employment with the regiment. This meant that, pursuant to s 8(10), the calculation of Mr Kennedy's "normal weekly earnings" would not include his Special Action Force Allowance after 5 June 2001.

The issue before the Tribunal was whether the calculation of Mr Kennedy's "normal weekly earnings" should continue to include the Special Action Force Allowance after 5 June 2001.

Mr Kennedy gave evidence at the hearing that, prior to his injuries, he had every intention of remaining in the Special Air Service Regiment for the rest of his military career. The Tribunal was satisfied that Mr Kennedy had a firm and unequivocal desire, intention and expectation that he would have continued to serve as a SASR Trooper beyond 5 June 2001, and a belief that, but for his injuries, he would still be a SASR Trooper.

Relying in part on statistical information, the Commission submitted that the average duration of postings to the Special Air Service Regiment was 5–6 years, and that, while Mr Kennedy's posting to the regiment may have extended beyond that period, his period of Special Air Service Regiment service would have expired by 5 June 2001.

In the absence of contradictory evidence from the Commission, the Tribunal found that there was no official policy of the Special Air Service Regiment, the Australian Army or

any other Australian Defence Force agency which imposed a limit on the period in which a soldier might serve in the Special Air Service Regiment.

Assessing the Commission's evidence, the Tribunal stated that it was not satisfied that Mr Kennedy would not have continued to serve as a Trooper in the Special Air Service Regiment beyond 5 June 2001. The Tribunal found that, had he continued to be employed as a member of the Army, Mr Kennedy would have continued to serve as a Trooper in the regiment, and would therefore have continued to receive Special Action Force Allowance.

The Tribunal set aside the decision under review and decided that the Special Action Force Allowance should be included in calculating Mr Kennedy's incapacity payments after 5 June 2001.

Wine and brandy

Re King Valley Vignerons Inc and Geographical Indications Committee
Re Baxendale's Vineyards Pty Limited & Ors and Geographical Indications Committee & Anor

[2006] AATA 885; 18 October 2006
Justice GK Downes, President

Whether there should be one or two wine regions within the King Valley – How the King Valley region should be identified and named

The King Valley is a wine growing area in North East Victoria. The Geographical Indications Committee, which has statutory authority to define and name wine regions in Australia under the *Australian Wine and Brandy Corporation Act 1980*, determined that the area should be identified by certain boundaries and indicated by the expression "King Valley".

There were two applications for review of the decision. One group submitted that an area including the highest country in which grapes are grown should be a separate region called the Whitlands High Plateaux. King Valley Vignerons Inc, a cooperative of vineyard owners, agreed with the Committee that there should be one region, but sought to include an additional area within its boundary.

In determining a geographical indication, the Committee and, on review, the Tribunal is required to have regard to the range of criteria set out in the *Australian Wine and Brandy Corporation Regulations 1981*. These include:

- whether the area falls within the definition of a subregion, a region, a zone or any other area;
- the history of the founding and development of the area;
- the existence in relation to the area of natural and constructed features such as rivers, roads and railways; and
- the degree of discreteness and homogeneity of the proposed geographical indication in respect of a range of attributes, including geological formation, uniformity of climate, whether part or all of the area is within a natural drainage basin and the history of grape and wine production in the area.

In relation to the proper approach to its task, the Tribunal noted that the first criterion requires attention, amongst other things, to the potential identification of an area of land "that is discrete and homogeneous in its grape growing attributes". Despite considerable debate regarding the meaning of the phrase "grape growing attributes", the Tribunal saw no reason for concluding that the legislature intended the decision-maker to ignore the ordinary meaning of the phrase. The Tribunal held that this first criterion is of major significance and states a necessary but not a sufficient condition precedent for classification. The other criteria are more associated with discretionary considerations as to whether an area which satisfies the condition precedent should be classified. Different criteria will call for differing evaluation in different cases.

The Tribunal was satisfied that a distinction can be drawn between the valley land and the plateau land and that it is more appropriate to link certain ridges with the Plateau than it is to link them with the valley floor. The Tribunal also acknowledged differences in grape growing characteristics within the area. While noting that there is greater homogeneity within the Plateau, the ridges, or the Plateau and the ridges together, than in the whole valley, the

Tribunal concluded that the lesser homogeneity of the whole valley does not deprive it from qualification as a region.

The Tribunal considered that the discretionary criteria not associated with viticulture or wine making, including the area's natural features, the history of the area and of grape and wine production and the use of the name King Valley point to the wider King Valley being classified as a region. In relation to grape growing attributes, the Tribunal accepted that there are differences in grapes grown, in growing techniques, in climate and in soils between the Plateau and ridges on the one hand and the balance of the area. However, on balance, the Tribunal was not satisfied that the King Valley and Whitlands High Plateaux were separate regions.

In determining the region's boundaries, the Tribunal held that the region should not include land on which wine grapes will not be grown but should include land on which wine grapes might be grown. The Tribunal also held that land within State Forests and National Parks should be included in order to avoid irregular boundaries, despite the fact that viticulture is unlikely in these areas.

The Tribunal set aside the decision of the Committee and substituted a decision that there should be a single region for the area called "King Valley" with the boundaries specified in the decision.