APPENDIX 6: DECISIONS OF INTEREST

This appendix contains summaries of a number of Tribunal decisions that were published during 2007–08. They reflect the different types of matters dealt with by the Tribunal and include some of the more important or interesting decisions delivered during the reporting year.

Environment

Re Nature Conservation Council of New South Wales Inc and Minister for the Environment and Water Resources & Ors

[2007] AATA 1876; 18 October 2007

Justice GK Downes, President; Associate Professor BW Davis, Member

Whether a fishery should be declared an approved wildlife trade operation — Whether the operation would be detrimental to the survival of grey nurse sharks

This application concerned the operation of the Ocean Trap and Line Fishery, an extensive fishery regulated by the New South Wales Government. Fish and other sea life taken from the fishery could be exported only if the fishery had been declared to be an "approved wildlife trade operation" under section 303FN of the *Environment Protection and Biodiversity Conservation Act 1999*. On 27 July 2006, the then Minister for the Environment and Water Resources made such a declaration, subject to certain conditions.

In making the declaration, the Minister had to be satisfied that the operation would "not be detrimental to … the survival of a taxon to which the operation relates". The Minister also had to be satisfied that certain other environmental objects were met, including that the operation would not be likely to threaten "any relevant ecosystem including (but not limited to) any habitat or biodiversity".

The Nature Conservation Council of New South Wales (the Council) sought review of the Minister's decision on the basis that the approved wildlife trade operation would be detrimental to the survival of the east coast population of grey nurse sharks. The Council primarily sought a variation of the conditions that had been imposed by the Minister. In particular, it sought to increase the number, size and extent of protection at certain critical habitat sites and more extensive bans on certain fishing practices.

There was no fishing for grey nurse sharks in the fishery. However, the Tribunal was satisfied that they were a taxon to which the operation related within the meaning of section 303FN of the Act. While noting that the population of grey nurse sharks is critically endangered, the Tribunal emphasised that its task was not to determine whether more or less protection of the sharks was a desirable object in itself. Rather, its task was to decide whether the operations of the fishery would be detrimental to the survival of grey nurse sharks or inconsistent with the other environmental objects.

The Tribunal considered evidence relating to the size of the grey nurse shark population and their habitats. It also received evidence about the decline of the population and the risks of injury and death associated with particular types of fishing hooks and line.

The Tribunal found that grey nurse sharks may well have reached the point of inevitable extinction, even if accidental deaths were eliminated. The threats to their survival are the consequence of their biology, the fact that they are already critically endangered and the fact that there are sufficient deaths from causes outside the fishery to threaten their existence. While deaths caused by the fishery would have an adverse impact on the sharks, this would not add to the detriment which would continue whatever action was taken. The Tribunal was not persuaded on the evidence that the additional protections proposed by the Council would have any measurable impact.

The Tribunal concluded that the operation of the fishery in accordance with the Minister's conditions would not be detrimental to the survival of grey nurse sharks when compared with the position they would otherwise be in. The Tribunal was also satisfied that the other environmental objects were met. The Tribunal affirmed the decision of the Minister.

Financial services regulation

Re Howarth and Australian Securities and Investments Commission

[2008] AATA 278; 8 April 2008

Deputy President SA Forgie; Dr GL Hughes, Member

Participant in the financial services industry — Whether a banning order should be imposed and for what period

Mr Howarth, who was the sole director and secretary of Presidential Financial Services Pty Limited (PFS), was the subject of a banning order made by the Australian Securities and Investments Commission (ASIC) under the *Corporations Act 2001* (Corporations Act). This meant that he could no longer hold certain roles in the financial services industry. In particular, he could not be an Authorised Representative (AR) of two companies holding Australian financial services licences. He had been an AR from 2003 until 2006 when the banning order was made.

On behalf of some of PFS's clients, Mr Howarth arranged short term loans, or 'premium funding', so that they could pay domestic insurance premiums. He would give details of the funding required and relevant details to a finance company that specialised in short term loans and that also acted as an intermediary between insurance brokers and premium funding firms. The finance company would direct the details to a premium funder which would then send PFS an application for the loan. Premium funders required the completed application form and evidence of the insurance policy as it provided the security for the loan.

Of relevance were 19 loans Mr Howarth had arranged for PFS clients and three he had arranged for himself. Together they totalled $1,442,974.45. Among the documents Mr Howarth gave the premium funders in support of the applications for these loans were false tax invoices, false insurance policies and insurance policies that he had altered to show a premium higher than the premium in fact payable. All 22 loans were repaid and nobody incurred any financial loss.

Mr Howarth pleaded guilty, and was convicted of certain offences, including obtaining financial advantage by deception contrary to the Victorian *Crimes Act 1958.*

ASIC may make a banning order under section 920A of the Corporations Act if a person has been 'convicted of fraud'. A banning order may be permanent or for a specified period.

The Tribunal considered the meaning of 'fraud' and decided that it should give the word a meaning consistent with the common law. The common law requires that two elements be established: i) that the person has deceived or had the intention to deceive; and ii) that there has been some loss of property or of an advantage. The Tribunal found that the offences of which Mr Howarth had been convicted contained these elements. Accordingly Mr Howarth had been 'convicted of fraud' and ASIC had power to make a banning order.

The Tribunal considered whether section 920A requires ASIC to make a banning order in these circumstances or whether it is discretionary. It concluded that the power is discretionary and proceeded to consider the factors affecting the exercise of that discretion. The Tribunal considered the Corporations Act and previous authorities that have considered those factors. It decided that, despite some *obiter dicta* to the contrary, it was bound to have regard to what is necessary to protect the public and is not permitted to have regard to matters such as punishment.

The Tribunal considered that Mr Howarth was, at heart, a good man who has made a considerable contribution to the community.

He lacked, however, an understanding of what is required of an AR and failed to accept responsibility for what he had done or to accept the shortcomings of his behaviour. Instead, he focused on the fact that all loans had been repaid, his clients were happy with the service he had provided and that there had been no financial loss to the lenders or borrowers. Mr Howarth had very little understanding of the risk to which he had exposed the premium funders.

Having regard to all of the evidence, the Tribunal was not satisfied that Mr Howarth had an appropriate understanding of what was required of him as an AR. The Tribunal concluded that his giving an enforceable undertaking would not protect the public and that he should be removed from the financial services industry under a permanent banning order. If he is able to rehabilitate himself, Mr Howarth could apply for variation or cancellation of the banning order in due course.

Immigration and Citizenship

Re Darwich and Minister for Immigration and Citizenship

[2007] AATA 2106; 24 December 2007

Senior Member PW Taylor SC

Application for Australian citizenship — Whether the applicant was a person of good character

Mr Darwich applied for Australian citizenship. A delegate of the Minister for Immigration and Citizenship rejected his application on the basis that he was not a person of good character. Mr Darwich applied to the Tribunal for review of the decision.

Between April and August 1998, Mr Darwich committed a number of offences. He pleaded guilty and was sentenced to a minimum term of imprisonment of three years and three months. The sentencing judge characterised the offences as serious but made favourable findings about Mr Darwich's expressions of contrition. The judge expressly found that, apart from the offences, Mr Darwich had an unblemished record.

The Tribunal noted that the delegate's decision appeared to have been influenced in part by an overstatement of the period during which the offences had occurred. However, the Minister maintained before the Tribunal that the nature of the offences and the significant period of imprisonment were indicative of Mr Darwich's lack of good character. Mr Darwich could not establish that he had become a person of good character when only a relatively short amount of time had passed since he was released from prison.

Mr Darwich presented evidence that he had completed education programs while in prison and participated in the work release program, a privilege only earned by good behaviour. Following his release from prison in 2003, he established a car repair business. He had obtained and maintained the licence required to conduct such a business under the *Motor Vehicle Repairs Act 1980* (NSW).

A number of referees, aware of both the nature of his past convictions and his period of imprisonment, vouched for Mr Darwich's good reputation and character. Evidence from his wife also attested to his good character.

The Tribunal referred to the Australian Citizenship Instructions which set out considerations relevant to the assessment of character under the *Australian Citizenship Act 1948*. It was noted in the Instructions that the term 'good character' has no statutory definition and bears the meaning it would convey in ordinary usage. The Instructions also specified that the significance of past criminal behaviour may be diminished where it is demonstrably aberrant by comparison with the general pattern of the applicant's conduct. While it is often prudent to require a reasonable amount of time to have passed in order to justify a conclusion that a person is currently of good character, other relevant factors include the applicant's contemporary status, employment and community reputation.

The Tribunal noted that the ultimate assessment as to whether a person is of good character is concerned with their enduring or intrinsic moral qualities. It is not necessary to be satisfied that the person meets, or has always met, the highest standards of integrity.

The Tribunal found that Mr Darwich's criminal conduct could be regarded as aberrant. His relatively prompt contrition indicated a public and unequivocal acknowledgement of wrongdoing. He had severed all contact with his former associates and his prison behaviour and educational achievements indicated a commitment to self-improvement. The issue of a licence to Mr Darwich in a regulatory environment where lack of good character is a disqualifying consideration demonstrated that he was, at least implicitly, regarded by a relevant State Government authority as being a person of good character. The evidence of Mr Darwich's wife corroborated the other evidence of his good character.

Notwithstanding the seriousness of the offences committed, the Tribunal concluded that Mr Darwich was a person of good character. It set aside the decision under review and remitted the application to the Minister for reconsideration.

Practice and procedure

Re Farnaby and Military Rehabilitation and Compensation Commission

[2007] AATA 1792; 21 September 2007

Justice GK Downes, President; Deputy President RJ Groom

Whether the limb of legal professional privilege known as litigation privilege applies to proceedings in the Tribunal

This case raised the question whether the limb of legal professional privilege called 'litigation privilege' applies to proceedings in the Tribunal. In *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91, the Supreme Court of New South Wales had held that 'litigation privilege' does not apply in the Tribunal.

Mr Farnaby applied to the Tribunal for review of a decision refusing his claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988*. He engaged a firm of solicitors to represent him in the proceedings.

Mr Farnaby's lawyers subsequently wrote to two doctors requesting advice and information relating to issues concerning the proceedings. The doctors replied providing such information and advice. The correspondence was produced to the Tribunal in answer to a summons and pursuant to a direction given by the Tribunal. The Military Rehabilitation and Compensation Commission sought access to it.
Mr Farnaby's representatives claimed the correspondence was protected from disclosure because the circumstances in which it was written gave rise to a claim for legal professional privilege.

The Tribunal noted that common law legal professional privilege has two branches. It is attracted by:

- communications between a client and lawyer for the dominant purpose of seeking and receiving legal advice (the so-called 'advice privilege');
- communications between a lawyer and client or third party for the dominant purpose of providing legal services in connection with pending or anticipated proceedings (the so-called 'litigation privilege').

Justice Downes inspected the correspondence and confirmed the nature of the contents. The hearing proceeded on the basis that the letters were communications between a lawyer and a third party for the dominant purpose of providing legal services in connection with the proceedings.

The Tribunal observed that, if the correspondence had related to proceedings before a court, privilege would apply. It considered that the appropriate course was to look at the nature of Tribunal proceedings and see whether they have characteristics sufficiently analogous to court proceedings to compel a conclusion that the proceedings attract privilege.

The Tribunal outlined some of the statutory characteristics of review in the Tribunal. It was noted that there are at least two parties to proceedings and that parties have the right to representation. The proceedings must generally be determined through a public

hearing and the Tribunal has power to take evidence on oath or affirmation and summons persons to give evidence or produce documents. These mandatory characteristics parallel litigation in the courts. The Tribunal must proceed in accordance with law and must ascertain and apply the law in making a binding decision.

The Tribunal concluded that litigation privilege does apply generally in the Administrative Appeals Tribunal unless it is abrogated by statute. The Tribunal considered that this conclusion was required by the decision of the High Court of Australia in *Waterford v The Commonwealth* (1987) 163 CLR 54 but that it would have come to the same conclusion as a matter of principle. The Tribunal noted that the rationale for the principle appears to be found in considerations such as the public interest in enhancing the administration of justice and in protecting freedom of communication. Given the nature of proceedings in the Tribunal, the Tribunal saw no basis upon which the rationale could sustain privilege in court proceedings but not in proceedings before the Tribunal.

The Tribunal concluded that Mr Farnaby was entitled to claim legal professional privilege in relation to the communications between his solicitors and the two doctors.

Social security

Re Secretary, Department of Families, Housing, Community Services and Indigenous Affairs and S & Anor

[2008] AATA 104; 8 February 2008

Justice BJ Tamberlin; Deputy President PE Hack SC; Senior Member MJ Carstairs

Whether a pre-operative male to female transsexual was a member of a couple for the purpose of determining the rate of payment of a pension

Ms S, a pre-operative male to female transsexual, was living in a relationship with a woman. Centrelink determined that Ms S should be paid a pension at the 'partnered' rate because she was a member of a couple. This decision was set aside by the Social Security Appeals Tribunal.

The *Social Security Act 1991* provided that Ms S was to be treated as a member of a couple if she was in a relationship with a person of the opposite sex and their relationship was a marriage-like relationship. The Act set out a number of matters that had to be taken into account in determining whether or not a marriage-like relationship existed. These included the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, any sexual relationship between the people and the nature of their commitment to each other.

The first issue considered by the Tribunal was whether Ms S is a person of the opposite sex. The evidence was that Ms S has been taking hormone replacement therapy since 1997 but is unable, for medical reasons, to have gender realignment surgery. The Tribunal found that Ms S is psychologically, socially and culturally a woman and can no longer function sexually or reproductively as a man. She has taken all of the physiological steps that she can take to become a woman.

The Tribunal referred to the decision of the Full Court of the Federal Court in *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 in which it was held that a completed surgical reassignment is necessary for an alteration of gender. Despite its factual findings, the Tribunal considered it was bound by that case. It found that Ms S was to be treated as a male for the purposes of the Act. The Tribunal did observe, however, that it may be appropriate for a court to consider whether the decisive weight given in SRA to anatomy as the essential and determinative factor of a person's gender should be revisited. Fifteen years have elapsed since SRA was decided and there may be further medical, psychological and other advances which may be taken into account in an appropriate case.

The second issue to be considered was whether Ms S was in a marriage-like relationship. The Tribunal noted that the Parliament used the descriptor 'marriage-like' in the Act and must have intended the adjective to perform some work. The language of the Act excluded same-sex

relationships and the Tribunal did not believe the Australian community would regard Ms S's relationship as one resembling marriage. The perception of Ms S and her partner and of their friends and associates was that it was a lesbian relationship, not a marriage-like relationship.

The Tribunal concluded that, as a matter of statutory construction, a same-sex marriage could not amount to a marriage-like relationship under the Act. Nor was the Tribunal satisfied on the facts of the case that Ms S's relationship was a marriage-like relationship. The Tribunal concluded that Ms S was entitled to the pension at the single rate. The decision of the Social Security Appeals Tribunal was affirmed.

Re Secretary, Department of Families, Community Services and Indigenous Affairs and Walshe & Anor

[2007] AATA 1861; 16 October 2007

Justice Downes, President; Senior Member JW Constance

Whether letters sent by Centrelink to Mr and Mrs Walshe were valid notices of changes to their age pension entitlements

Mr and Mrs Walshe first received the age pension in 1999 after Mr Walshe retired from full-time employment. Mr Walshe continued to work part-time and his income varied, both in amount and frequency of payment. From time to time, as required by law, Mr Walshe advised Centrelink of the various income amounts he earned and Centrelink determined the pension payable. Between 1999 and 2005, a number of determinations were made which altered the amounts of pension payable based on the reported income amounts.

In 2005, Mr and Mrs Walshe sought review of a number of the determinations made by Centrelink. A Centrelink Authorised Review Officer noted that the review applications had been made more than 13 weeks after Mr and Mrs Walshe had been notified of the decisions. While the original determinations may have been incorrect, section 109 of the *Social Security (Administration) Act 1999* provided that a favourable determination could only take effect from the date of the application for review, not the dates of the original decision. The Social Security Appeals Tribunal set aside Centrelink's decisions.

Mr and Mrs Walshe submitted that they had not been given valid notice of the original determinations for the purposes of section 109 of the Act.

The Tribunal considered several matters in deciding whether Mr and Mrs Walshe had been properly notified of the original decisions. It looked firstly at the provisions of the Act pursuant to which those decisions were made and identified the elements of those decisions. The Tribunal noted the statement made by Justice Cooper in *Secretary, Department of Family and Community Services v Rogers* (2000) 104 FCR 272 that the matter to be communicated by a notice of this kind involves two elements: the fact that a decision has been made and the content of the decision.

The Tribunal observed that, in deciding whether a particular letter effectively conveys the information required, it is appropriate to consider how the letter would be read by ordinary or reasonable persons within the group of persons to whom the information is directed. It is also appropriate to consider the purposes of the notice. The main purpose must be to inform the pensioner of whether he or she will receive further pension payments and what those payments will be. A further purpose will be to advise of change. However, the pensioner will also know what pension he or she has been receiving. In many cases, the change in the pension payment amount will be in response to a notified change of circumstances.

The Tribunal considered seven different letters which were representative of the various letters sent by Centrelink to Mr and Mrs Walshe. The Tribunal found that each of the seven letters met the notice requirements of the Act and set aside the decisions of the Social Security Appeals Tribunal. However, the Tribunal also expressed the view that such notices should be drafted more clearly and consistently. They should at least inform

benefit recipients of the following matters:

- that a decision has been made to change the person's pension entitlement;
- the nature of the change, whether it is an increase, decrease, suspension or cancellation;
- when the change takes effect;
- the amount of the old entitlement; and
- the amount of the new entitlement.

Taxation

Re Food Supplier and Commissioner of Taxation

[2007] AATA 1550; 16 July 2007

Justice GK Downes, President

Whether promotion items supplied 'free' with food attracted GST

The Food Supplier was a supplier of food products like instant coffee. From time to time, it supplied promotion items that were packaged with the food, such as alarm clocks, radios and cricket balls. They were branded with the Food Supplier's name and marked as 'free'. The combined packages were sold for the same price as the food alone.

The supply of the promotion items to the Food Supplier attracted GST. The Food Supplier claimed input tax credits. It argued that the further supply of the promotion items to retailers was not for consideration. As the supply of the food was GST-free, no GST was payable.

For the supply of a product to be a "taxable supply" attracting GST under the *A New Tax System (Goods and Services Tax) Act 1999*, it must be made for consideration. Consideration is defined widely under the Act to include "any payment, or any act of forbearance, in connection with a supply" or "in response to or for the inducement of a supply".

The primary issue before the Tribunal was whether the promotion items were supplied for consideration.

The Food Supplier emphasised that the promotion item was labelled 'free' and that this carried the implication there was no consideration for its supply. The Tribunal cautioned against equating modern use of the word 'free' with the absence of consideration. Even if calling the promotion items 'free' was not misleading, it did not follow that, as a component of an overall package, they were provided without consideration.

The Tribunal noted that the promotion items could only be acquired in packages with the food products. The Food Supplier would not supply them free of charge alone. This case differed from a case where promotion items are given away separately without requiring purchase of a product. In such a case, the promotion items may induce someone to purchase a product, but there is no obligation to buy the product.

The Tribunal held that there was consideration in this case for the supply of the packaged products as a whole, including the promotion items. The consideration for the supply of the two items was the single price paid for the two items.

In relation to the calculation of the tax payable, the Tribunal held that, where there is a supply which is partly taxable and partly GST-free, the Act requires an apportionment. As the food products were GST free, the taxed component was confined to each part of the supply that was taxable, namely the promotion items.

Re F and Commissioner of Taxation

[2008] AATA 462; 3 June 2008

Deputy President J Block

Whether expenses incurred by a person with a disability in employing a personal assistant were tax deductible

Ms F is confined to a motorised chair and has limited motor skills. She was studying law and obtained work as a legal summer clerk. During that time, Ms F employed an administrative assistant to perform tasks including typing, writing notes and papers, moving files and arranging her desk. The assistant worked for eight hours per day, assisting Ms F with office duties for seven

hours. She also assisted Ms F for one hour per day with personal functions such as dressing and eating.

Ms F sought a private ruling from the Commissioner of Taxation as to whether she was entitled to deductions for expenses incurred in advertising for, training and paying wages to the assistant, and for associated workers' compensation and superannuation expenses incurred in employing the assistant. The Commissioner of Taxation ruled that she was not entitled to such deductions.

The *Income Tax Assessment Act 1997* provides that a loss or outgoing can be deducted from assessable income if it is incurred in gaining or producing the income. However, a loss or outgoing cannot be deducted if it is of a private or domestic nature.

The Tribunal accepted that the expenses incurred by Ms F were incurred for the purpose of producing the assessable income. However, it noted that this was not sufficient. The expenses must have been incurred 'in' gaining or producing the income. They must have been incidental and relevant to that end.

The Tribunal observed that this was not a case in which the expense was incurred in order to enable Ms F to take up the employment or incurred prior to commencement of the income-earning activity such as travel or child care expenses. The services provided by Ms F's assistant were furnished in the office during the course of each working day. The Tribunal was satisfied that the non-personal services constituted an expense incurred in order to enable Ms F to carry out her duties and thus incurred in producing the income.

The Tribunal accepted that an expense incurred to overcome a physical disability will usually be private or domestic and therefore non-deductible. For example, items such as spectacles, hearing aids, wheelchairs and crutches may be used both at work and at home. However, by contrast, the seven hours per day of non-personal services provided by Ms F's assistant were required only at and for work, and could not be aptly described as personal or domestic. The one hour per day of personal services, on the other hand, was clearly a private expense.

The Commissioner of Taxation contended that an employee does not have the power to delegate the performance of his or her functions and, as such, any expense incurred in doing so would not be deductible. The Tribunal found, however, that Ms F was not delegating her work to the assistant. The assistant merely performed the physical tasks that Ms F needed done in order to fulfil her obligations as a law clerk.

The Tribunal noted that the case was argued, in the main, as to whether the deductions should be denied because the expenses were private or domestic in nature in order to overcome her physical disability. The Tribunal considered it arguable, however, that the 'essential character' of the expenses was no more nor less than the payment of wages for services needed in order to enable Ms F to derive her income. If this approach were correct, the fact that Ms F suffered from a disability was irrelevant. The expenses would be deductible regardless of why the services were obtained.

The Tribunal concluded that Ms F was entitled to a deduction for seven-eighths of her expenditure in employing the assistant.

Veterans' affairs

Re Brinkworth and Repatriation Commission

[2008] AATA 174; 29 February 2008

Deputy President DG Jarvis; Mr S Ellis AM, Member

Whether a veteran who was servicing and maintaining aircraft during the British nuclear test program was a 'nuclear test participant' for the purposes of the Australian Participants in British Nuclear Tests (Treatment) Act 2006

Between 1958 and 1961, Mr Brinkworth was an engine fitter with the Royal Australian Air Force (RAAF) and served at the Edinburgh base in South Australia. His responsibilities included maintaining the engines of Valiant and Canberra bombers that belonged to the

Royal Air Force (RAF). These aircraft had flown to Maralinga in the south west of South Australia, being an area where Britain had carried out atomic testing in Australia in the 1950s and 1960s.

In 2001, the Department of Veterans' Affairs produced a book entitled *Preliminary Nominal Roll of Australian Participants in the British Atomic Tests in Australia* (the Roll). Mr Brinkworth's name was included in that Roll. The introduction to the Roll records that the British atomic testing program involved the detonation of twelve nuclear devices from October 1952 to October 1957. The last seven of those explosions occurred at Maralinga. The Roll also records that a series of 'minor' nuclear trials were conducted at Maralinga between 1957 and 1963.

The issue for the Tribunal was whether Mr Brinkworth was a 'nuclear test participant' within the meaning of section 5(2) of the Act, on the grounds that he was involved in the maintenance or cleaning of aircraft that were contaminated as a result of use in the Maralinga nuclear test area.

Mr Brinkworth gave evidence that, although he could not prove that any of the aircraft that he cleaned or maintained during his service at Edinburgh were contaminated, special measures were taken in connection with the cleaning and maintenance of the aircraft that did not apply to other aircraft. These included:

(i) the establishment of an area on a remote part of the Edinburgh Airfield for the servicing and cleaning of the Canberra aircraft;

(ii) he had been issued with different overalls before servicing the aircraft, and the overalls were deposited in a special bin once the service had been completed;

(iii) the aircraft were hosed down with high pressure hoses, and the water was channelled into a pit especially dug to receive that waste water;

(iv) the crew involved in the servicing and cleaning of the aircraft were required to have a shower before leaving the area; and

(v) the aircraft had air monitoring devices fitted to their wings before flights to Maralinga (the records of which were likely to have been kept by the RAF and not the Australian government).

The Tribunal took into account that Mr Brinkworth experienced difficulties in obtaining evidence in support of his claim. This was partly due to the passage of time and also due to the fact that the tests in question were highly secret and were being conducted by the British government.

The Tribunal found that, although there was no evidence that the aircraft in question were in fact contaminated, there was evidence that steps were taken on a regular basis to decontaminate the aircraft that had returned to the Edinburgh base from flights to Maralinga. Further, there was some documentary evidence that indicated that the minor trials entailed radioactive contamination, and the use of air monitoring devices suggested that there must have been a level of contamination to be measured.

The Repatriation Commission contended that the decontamination procedures adopted at Edinburgh during Mr Brinkworth's service were merely 'fail-safe' procedures, but did not adduce any evidence to that effect.

The Tribunal considered the circumstances in which it was permissible to draw inferences from the evidence before it. The Tribunal decided that it could infer from the evidence before it that the aircraft that Mr Brinkworth serviced and maintained were contaminated. The Tribunal accordingly set aside the decision under review and decided instead that Mr Brinkworth was a 'nuclear test participant' and a person eligible to be provided with treatment under the Act.

Workers' compensation

Re Ledwidge and Optus Administration Pty Ltd

[2008] AATA 58; 22 January 2008

Ms R Perton, Member

Whether the applicant was entitled to compensation for an injury sustained outside of normal working hours

Mr Ledwidge worked as a technician with Optus between 1996 and 2006. He claimed that he injured his back on a Sunday in January 2006 while organising the interior of his work van. Optus refused Mr Ledwidge's claim for compensation. It determined that, as the injury occurred on a Sunday, it did not arise in the course of his employment.

The issue for the Tribunal was whether Mr Ledwidge suffered an injury arising out of, or in the course of, his employment and was entitled to compensation.

The evidence presented to the Tribunal was that Optus provided their technicians with vans to get to the various work sites. Technicians were allowed to take their vans home. The technicians' usual working day was from 7.30 am to 3.30 pm Monday to Friday.

Mr Ledwidge told the Tribunal that, on the Friday before his injury, he had received a large delivery of stores which he had loaded into his van. On the Sunday, he decided to remove the stock and clean the van. Mr Ledwidge said that he usually spent time on a Sunday organising his vehicle for the next day. As he was bending, he twisted and experienced severe pain in his lower back.

Mr Ledwidge was hospitalised for a number of days and eventually returned to work in February 2006. An expert medical report indicated that Mr Ledwidge had suffered from a prolapsed disc and that work factors had materially contributed to it.

The Tribunal accepted Mr Ledwidge's evidence as to the circumstances in which the injury occurred. The Tribunal considered that he had aggravated a previous back injury.

Mr Ledwidge and other Optus staff gave evidence that Optus, through its team leaders, encouraged the technicians to keep their vehicles clean and tidy. It was not unusual for technicians to tidy up and wash their vans outside regular hours, often on the weekend.

The Tribunal reviewed a number of cases which concerned whether an employee qualified for compensation where an injury occurred outside normal working hours. These included the decision of the High Court in *Humphrey Earl Limited v Speechley* (1951) 84 CLR 126. The Tribunal noted Justice Dixon's statement that the acts of an employee and whatever is incidental to the performance of the work are done in the course of employment. When an accident occurs in intervals between work, whether it occurs in the course of the employment will depend on whether the employee was doing something which he was reasonably required, expected or authorised to do in order to carry out his duties.

The Tribunal held that, on the day he injured his back, Mr Ledwidge was engaging in an activity he was reasonably expected to do in relation to his employment, namely organise his van so that he could work efficiently. There was no directive that employees were not to do so on the weekend. The evidence showed it was a common practice of field technicians to do so and that Optus team leaders were aware of this practice.

The Tribunal found that Mr Ledwidge's aggravation of his back injury arose out of, or in the course of, his employment. The Tribunal remitted the matter to Optus to calculate the amount of compensation payable.