APPENDIX 7: DECISIONS OF INTEREST

This appendix contains summaries of a number of Tribunal decisions that were published during 2008–09. 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.

Aviation

Re McWilliam and Civil Aviation Safety Authority

[2008] AATA 687; 6 August 2008

Mr E Fice, Member

Whether concurrent parachuting and general aviation activity should be allowed at Barwon Heads Aerodrome

Mr McWilliam operated a parachuting business at the Barwon Heads Aerodrome (BHA), dropping between 14,000 and 20,000 parachutists per year. The Civil Aviation Safety Authority (CASA) began receiving complaints about the parachuting operations. These related to matters such as parachutists descending through cloud and near collisions between parachutists and aircraft.

On 6 April 2005, CASA issued two legislative instruments which had the effect of preventing parachuting at BHA. The first instrument directed pilots not to permit a person to make a parachute jump within 4.8 km of BHA. The second instrument varied a general authorisation permitting parachute descents by specifically prohibiting parachute descents within 4.8 km of BHA.

Mr McWilliam applied for review of the decision to issue the two instruments. In a preliminary decision ([2005] AATA 1148), Deputy President Forgie found that the Tribunal had jurisdiction to review the issue of the second instrument but not the first instrument. The review proceeded, however, on the basis that, if the Tribunal were to make a decision that parachuting operations should resume at BHA, CASA would revoke the first instrument.

In 2008, Mr McWilliam constructed a runway on property that he owned adjacent to BHA, some 300 metres from the existing main runway. Mr McWilliam argued that, in reviewing CASA's decision, the Tribunal should take into account recent developments, including alternative proposals he had developed for airspace use at BHA. The Tribunal considered the High Court's decision in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 and decided that the correct approach was to limit its consideration to the circumstances existing at the time the decision was made by CASA to issue the legislative instrument.

The Tribunal found that unauthorised parachute descents through cloud had occurred at BHA. Serious conflicts between aircraft and parachutists had also occurred from time to time. The Tribunal accepted that it is possible to conduct parachuting and general aviation activities concurrently, but that this can only be done when there is strict adherence to regulations which have been made to ensure the separation of the participants in those activities. It is imperative that there is a sound relationship between the groups involved in the different activities. This was not the case at BHA. The Tribunal found that concurrent parachuting and general aviation activities at BHA posed a serious risk to the safety of air navigation in that area. The Tribunal concluded that CASA's decision to issue the second instrument was the preferable decision.

Environment

Re Wildlife Protection Association of Australia Inc and Minister for the Environment, Heritage and the Arts and Director-General of the Department of Environment and Climate Change (NSW)

[2008] AATA 717; 15 August 2008: [2008] AATA 846; 23 September 2008: [2008] AATA 1079; 2 December 2008

Deputy President PE Hack SC; Dr TJ Hawcroft, Member

Whether a plan for the commercial harvesting of kangaroos in New South Wales should be declared an approved wildlife trade management plan

The *New South Wales Commercial Kangaroo Harvest Management Plan 2007–2011* (the Plan) was developed by the New South Wales Government to regulate the commercial culling of four species of kangaroo. Products derived from the kangaroos could be exported from Australia only if the Plan was declared an approved wildlife trade management plan under Part 13A of the *Environment Protection and Biodiversity Conservation Act 1999*. The Minister for the Environment and Heritage made such a declaration in December 2006. The Wildlife Protection Association of Australia Inc. sought review of the Minister's decision to approve the Plan.

Before the Plan could be approved, the Minister, and the Tribunal on review, had to be satisfied of a number of matters set out in section 303FO of the Environment Protection and Biodiversity Conservation Act. These included requirements relating to the ecological sustainability of the proposed activities, the conservation of biodiversity, the humane treatment of the animals, assessment of the environmental impact of the proposed activities and ongoing management of the environmental impact.

The overarching goal stated in the Plan was the maintenance of viable populations of kangaroos in accordance with the principles of ecologically sustainable development. The Plan provided for population surveys to be undertaken, the setting of quotas for the different species of kangaroo and continuous indirect monitoring of populations. It was considered that approximately one million kangaroos would be culled each year during the five-year life of the Plan.

The Tribunal considered evidence on ecological sustainability and found there was a low risk of overharvesting. The Tribunal was satisfied that, with certain amendments, the Plan would manage the harvesting of kangaroos in an ecologically sustainable way.

The Tribunal did not accept that the culling of kangaroos would, of itself, contribute to the conservation of biodiversity. However, the Tribunal held that the Act did not require such a finding. The Plan was not inconsistent with biodiversity conservation and, as such, would promote it.

The Tribunal considered evidence about the ways in which kangaroos are killed. The Plan required trappers to seek to achieve instantaneous death by a shot to the brain but, if this could not be achieved, to dispatch wounded kangaroos or orphaned joeys quickly and humanely. The Tribunal was satisfied that the Plan and the system of accreditation, licensing and compliance management for trappers promoted the humane treatment of kangaroos. It was likely that the kangaroos would be killed in a way that was generally accepted as minimising pain and suffering.

The Tribunal was also satisfied that the Plan contained an adequate assessment of the environmental impact of the harvesting, and included proper and adequate measures to mitigate and monitor the environmental impact. However, the Tribunal had concerns about the lack of measures in the Plan to respond to an unusual decline in numbers. The Tribunal considered that the Plan should be amended to incorporate a requirement that culling be suspended if appropriate trigger points were reached.

Subject to the inclusion of the proposed amendment, the Tribunal was satisfied of the matters set out in section 303FO of the Environment Protection and Biodiversity Conservation Act. The Director-General of the Department of Environment and Climate Change formulated a variation to the Plan to address the Tribunal's concerns. The Tribunal varied the decision under review in accordance with that variation.

Export market development grants

Re Nepenthe Wines Pty Ltd and Australian Trade Commission

[2008] AATA 974; 3 November 2008

Deputy President DG Jarvis

Whether sales of wine produced by the applicant and exported to a US corporation via an Australian company should be taken into account when assessing entitlement to a grant

Nepenthe Wines Pty Ltd was carrying on business in Australia as a vigneron and producer of wines marketed under its own label. Nepenthe entered into a distributorship agreement, effective from January 2000, with Click Imports, a US corporation. The agreement was varied by the subsequent involvement of Click Exports Pty Ltd, a company incorporated in Australia.

Nepenthe applied to Austrade, under the *Export Market Development Grants Act 1997*, for a grant in relation to wine exported in the 2004–05 financial year. Austrade decided not to take into account the proceeds of some 20 sales of wines on the basis that the sales had been made to an Australian resident rather than an overseas purchaser.

Section 109 of the Export Market Development Grants Act provided that a person is taken to sell eligible goods only if Austrade is satisfied that the property in the goods passes from that person to a person who is not a resident of Australia at the time when the goods are sold. Section 110 provided that, if a person sells eligible goods at a time when the goods are in Australia, and the buyer later exports the goods, the seller (not the buyer) is taken to export the goods.

It was common ground that the wine produced by Nepenthe constituted eligible goods for the purpose of the Export Market Development Grants Act. Nepenthe contended that, under the 2000 distributorship agreement, title in wine exported to Click Imports passed from Nepenthe to Click Imports upon delivery of the wine on board the shipping vessel, and that this was not affected by the subsequent variation to the agreement. Austrade contended that Nepenthe, Click Imports and Click Exports had entered into a tripartite agreement that took the place of the distributorship agreement and that, under the tripartite agreement, title in goods passed from Nepenthe to Click Exports, thus entitling Click Exports to the grant under the Export Market Development Grants Act.

The former managing director of Nepenthe gave evidence that he had no knowledge of any tripartite agreement until the matter had been raised during the Tribunal proceedings. Click Exports and Click Imports were unable to find a copy of the agreement with Nepenthe or any correspondence or communications referring to the agreement with Nepenthe.

The Tribunal found that the course of conduct was consistent with the continued existence of the original distributorship agreement, and that no tripartite agreement was ever entered into with Nepenthe. The Tribunal concluded that the communications from Click Exports constituted a variation of the original distributorship agreement, and Click Exports negotiated that variation on behalf of Click Imports. The original distributorship agreement continued to subsist, but had been varied by the subsequent course of conduct of the parties. Click Exports did not become a party but acted on behalf of Click Imports to facilitate the performance of the distributorship agreement, with Nepenthe assuming that Click Exports was merely acting on behalf of Click Imports.

On the Tribunal's findings, therefore, property in the wine did not pass from Nepenthe to Click Exports, but rather to Click Imports. As that corporation was not a resident of Australia at the time when the wine was sold to it, the Tribunal held that the sales of the wine in question should have been taken into account by Austrade when calculating Nepenthe's entitlement to a grant under the Export Market Development Grants Act. The Tribunal accordingly set aside the decision under review and remitted the matter for reconsideration in accordance with its reasons.

Financial services regulation

Re Moore and Australian Securities and Investments Commission

[2008] AATA 1164; 23 December 2008

Justice GK Downes, President; Deputy President RJ Groom; Senior Member AF Cunningham

Whether a banning order could be made in relation to the applicant — the meaning of 'convicted of fraud'

Mr Moore was convicted of an offence under section 64(1) of the *Australian Securities and Investments Commission Act 2001*. He was found guilty of making a false or misleading statement in the course of an examination conducted under the *Corporations Act 2001*. The Australian Securities and Investments Commission subsequently made a banning order prohibiting Mr Moore from providing financial advice for 18 months. Mr Moore applied to the Tribunal for review of this decision.

Section 920A(1) of the Corporations Act provided that ASIC could make a banning order if the person was convicted of fraud. However, the word 'fraud' did not appear in section 64 of the Australian Securities and Investments Commission Act. The question for the Tribunal was whether Mr Moore's conviction under the Australian Securities and Investments Commission Act was a conviction of fraud. This involved considering not only the meaning of the words 'convicted of fraud', but also the influence of the term 'serious fraud' which was defined in section 9 of the Corporations Act to mean an offence involving fraud or dishonesty:

- against an Australian law or any other law, and
- punishable by imprisonment for life or for a period, or maximum period, of at least three months.

The Tribunal first considered the elements of fraud at common law. It found that fraud involved, at least, a fraudulent act such as making a statement known to be untrue. It also involved intent to advantage the actor or disadvantage the object of the fraudulent act, although in the case of a public official, the intent could merely be to affect the official's conduct. The Tribunal held that the offence under section 64(1) of the Australian Securities and Investments Commission Act could be established without any evidence of intent to advantage or disadvantage. The absence of this element meant that a conviction under section 64 was not a conviction of fraud at common law.

However, the Tribunal held that Mr Moore had been convicted of serious fraud as defined in section 9 of the Corporations Act. By making a false statement without reasonable belief in its truth when there was a statutory obligation to be truthful, Mr Moore had acted dishonestly, even if it was arguable that the statement was not made to advantage or disadvantage. The Tribunal was satisfied that a person convicted of an offence under section 64(1) of the Australian Securities and Investments Commission Act is convicted of an offence involving dishonesty. The further two requirements under section 9 were also satisfied.

The Tribunal concluded that, by being convicted of 'serious fraud', Mr Moore was 'convicted of fraud' within the meaning of section 920A(1) of the Corporations Act. He was therefore liable to be subject to a banning order. The Tribunal affirmed the decision under review.

Immigration and citizenship

Re Gaigo and Minister for Immigration and Citizenship

[2008] AATA 590; 9 July 2008

Deputy President BH McPherson CBE

Whether the applicant was entitled to become an Australian citizen again

Mrs Gaigo was born in Papua in 1948. She claimed that the Australian citizenship she held before Papua New Guinea became independent should continue to be recognised. Her application to resume Australian citizenship was refused under the *Australian Citizenship Act 2007*. Mrs Gaigo applied to the Tribunal for review of the decision.

The Tribunal noted that in 1948 Papua was a Territory of the Commonwealth of Australia and Mrs Gaigo became a British subject when she was born. On the commencement of the *Nationality and Citizenship Act 1948* (Cth), any British subject born in Australia automatically became an Australian citizen. As Australia was defined in that Act to include Territories such as Papua, the Tribunal found that Mrs Gaigo became an Australian citizen.

Papua New Guinea became an independent state on 16 September 1975. Under the Papua New Guinea Constitution, all persons born in Papua were converted into citizens of Papua New Guinea if they had at least two grandparents who were born there and if they had no right of permanent residence in Australia. The Tribunal was satisfied that Mrs Gaigo became a citizen of Papua New Guinea on that day.

The *Papua New Guinea Independence Act 1975* (Cth) provided that Australia ceased to have any sovereignty or rights of administration in respect of Papua New Guinea from the day it became independant. The Tribunal noted that, at common law, this had the effect that the people of Papua New Guinea ceased to be Australian citizens. In addition, the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* provided explicitly that any Australian citizen who became a citizen of Papua New Guinea on 16 September 1975 thereupon ceased to be an Australian citizen. The validity of these regulations was upheld by the High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439.

Mrs Gaigo argued that the deprivation of her Australian citizenship was contrary to Article 15 of the Universal Declaration of Human Rights which provides that everyone has the right to nationality and no one shall be deprived arbitrarily of it. The Tribunal noted that Kirby J had rejected a submission of this kind in *Ex parte Ame*. Those affected by the change of citizenship did not lose a right to nationality. Their nationality status had simply changed as a result of the change of the sovereignty of their birthplace.

The Tribunal held that Mrs Gaigo had ceased to be a citizen of Australia on 16 September 1975. There was nothing in either the Nationality and Citizenship Act or the Australian Citizenship Act that would have enabled her to resume her Australian citizenship which was lost by operation of law. The Tribunal affirmed the decision under review.

Social security

Re Secretary, Department of Education, Employment and Workplace Relations and Morrison

[2008] AATA 1017; 12 November 2008

Justice GK Downes, President; Deputy President RJ Groom; Senior Member AF Cunningham

Calculation of the period during which social security benefits not payable following receipt of an award of damages — whether payments for medical expenses should be included in the amount of damages

In January 2006, Mr Morrison was injured in a motor vehicle accident in Tasmania. He suffered significant injuries requiring medical treatment. Pursuant to the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas), the Motor Accident Insurance Board made approximately 33 payments to hospitals and doctors for a range of medical, hospital and rehabilitation treatment that Mr Morrison received.

In March 2007, Mr Morrison commenced proceedings at common law for damages for negligence. He settled his claim for $50,000 plus costs in November 2007. In accordance with the Tasmanian scheme, the consent judgment excluded the medical expenses paid by the Board which totalled $51,528.56.

The *Social Security Act 1991* includes provisions designed to ensure that a person who suffers personal injury and receives compensation for lost earnings or lost earning capacity does not also receive income support payments for the same period. At the relevant time, all lump sum compensation payments received by a person, including any amounts payable for other heads of compensation such as pain and suffering, were to be identified and added together. The Social Security Act then deemed that 50 per cent of that total amount was for lost earnings or lost earning capacity. This figure was used to calculate the length of the period during which the person could not be paid certain social security benefits.

The issue for the Tribunal was whether the medical expenses paid by the Board should be included in the total amount of compensation to which the 50 per cent rule would be applied. The Tribunal noted that, if this were the case, the practical effect would be that 100 per cent of the judgment of $50,000 would be apportioned to loss of earnings. Nothing would be excluded as representing pain and suffering or any other non-income element.

The Tribunal examined closely the schedules outlining the payments made by the Board. Noting that the words 'lump sum payment' were not defined in the Social Security Act, the Tribunal held that their meaning should be determined by their ordinary meaning viewed in the context of their use in the Act. The Tribunal found that the payments for medical expenses were not lump sum payments. This was because a lump sum payment for the purposes of the scheme required more than 'a set of payments for medical services whose grouping is neither entirely logical nor uniform which links items together in some cases and not in others'. The phrase did not cover payments not dependent on fault, paid continuously over a period of time, and not lumped together in an ordered way for the purposes of payment.

The Tribunal also considered whether Mr Morrison had 'received' the payments for the purposes of the Social Security Act. It held that, although Mr Morrison's medical expenses were paid on his behalf and for his benefit, it could not be said that any payments had been received by him.

The Tribunal found that the lump sum compensation payment was restricted to the $50,000 awarded in the consent judgment. The part of the payment relating to loss of earnings or loss of earning capacity was therefore $25,000. No youth allowance had been paid to Mr Morrison during the resulting preclusion period of 33 weeks and there was no amount to be repaid. The Tribunal affirmed the decision of the Social Security Appeals Tribunal.

Taxation

Re Hornsby Shire Council and Commissioner of Taxation

[2008] AATA 1060; 26 November 2008

Deputy President GD Walker; Deputy President J Block

Whether a compulsory acquisition of land undertaken at the request of a landowner was a 'supply' within the meaning of A New Tax System (Goods and Services Tax) Act 1999

CSR Ltd was the owner of the Hornsby Quarry. The Hornsby Shire Council rezoned the land on which it was located as public recreation land. Pursuant to the Hornsby Local Environmental Plan 1994, the Council was required to acquire land rezoned as public recreation land if the owner requested this in writing. CSR made such a request.

The Council published a notice of compulsory acquisition of land in the *NSW Government Gazette*. The Council paid CSR Ltd $26,508,771 in compensation for the market value of the land, the loss attributable to disturbance, and interest. The Council claimed an input tax credit of $2,409,888.

The main issue before the Tribunal was whether the compulsory acquisition by the Council of the quarry constituted a 'supply' within the meaning of section 9-10 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The term 'supply' was defined generally to be any form of supply whatsoever and to include:

- a grant, assignment or surrender of real property: section 9-10(2)(d), and
- any entry into, or release from, an obligation to do anything, to refrain from an act or to tolerate an act or situation: section 9-10(2)(g).

The Commissioner conceded that, if the acquisition of the quarry was a taxable supply, the Council was entitled to an input tax credit.

The Commissioner of Taxation contended that the acquisition of the quarry took place in consequence of the publication of the notice in the *Gazette*. The notice given by CSR under the Local Environmental Plan did not constitute a disposal of an interest in property. CSR could have sold the quarry thereafter to a third party.

The Tribunal found that CSR giving the notice under the Local Environmental Plan was the driving force which resulted in the Council acquiring the quarry. When CSR gave the notice to the Council, it incurred legal obligations. CSR could not have sold the quarry to a third party. Had it attempted to do so, the Council would have been entitled to injunctive relief. The Tribunal was satisfied that, in giving the notice, CSR made a supply within the meaning of section 9–10(2)(g) of the GST Act. The Tribunal also considered the meaning of the term 'surrender' and was satisfied that there was a supply within the meaning of section 9–10(2)(d) of the GST Act.

The Tribunal set aside the Commissioner of Taxation's decision.

Re Roche Products Pty Ltd and Commissioner of Taxation

[2008] AATA 639; 22 July 2008

Justice GK Downes, President

Whether the applicant paid arm's length prices for pharmaceutical and other products — transfer pricing methods

Roche Products Pty Ltd (Roche Australia) was a subsidiary of the multinational pharmaceutical company Roche Holdings Ltd based in Switzerland. It was part of the Roche Group. At the relevant time, Roche Australia was carrying on business through three divisions: the Prescription Division which imported and sold Roche prescription pharmaceuticals, the Consumer Division which sold over-the-counter products, and the Diagnostics Division which sold diagnostic equipment and products.

The Commissioner of Taxation conducted a review of the amount paid by Roche Australia to other companies in the Roche Group for its products. Applying section 136AD of the *Income Tax Assessment Act 1936*, the Commissioner of Taxation assessed Roche Australia to higher income tax on the basis that the amounts it paid were more than the amounts which would be paid in arm's length transactions. Amended assessments were issued for the income tax years ended 30 June 1993 to 30 June 2003. The Tribunal was required to determine whether the amended assessments were excessive.

Roche Australia accepted its acquisitions were not at arm's length. The Tribunal's task was therefore to consider whether they exceeded arm's length prices. The Tribunal noted that, where there is a substantial free market for goods, it will not usually be difficult to establish a benchmark against which the prices paid by a subsidiary to its holding company can be measured. In the case of pharmaceutical products, however, this was difficult because there is generally no free market for these products. The Tribunal considered expert evidence from a number of economists in deciding an appropriate method for determining arm's length prices.

The Tribunal was satisfied that the prices for which Roche Australia acquired the products sold in its Consumer Division and Diagnostic Division were arm's length prices. In relation to the Prescription Division, the Tribunal found that the taxable income was higher than that contended by Roche Australia but, in most cases, not as high as the income on which the amended assessments were based.

In relation to the 1997, 2002 and 2003 income tax years, the Tribunal concluded that the amount of taxable income would be higher than that determined by the Commissioner of Taxation. The Tribunal held that it had the power to increase the amount of assessable income in relation to the 2002 and 2003 years but not in relation to 1997. The period during which an amended assessment could be issued increasing liability had expired in relation to that year.

The Tribunal set aside the Commissioner of Taxation's decision in relation to 10 of the 11 income tax years, substituting decisions relating to the taxable income for the relevant year and remitting the matters to the Commissioner of Taxation for further consideration in accordance with the Tribunal's reasons. The decision in relation to the 1997 income tax year was affirmed.

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Veterans' affairs

Re McMahon and Repatriation Commission

[2008] AATA 662; 16 July 2008: [2009] AATA 253; 20 April 2009

Senior Member J Kelly; Dr JD Campbell, Member

Whether the veteran was entitled to disability pension at the special rate

Mr McMahon was born in 1915 and served in the Royal Australian Air Force in World War II. From 1974 until 2006, he worked for the Australian Bureau of Statistics (ABS) on a part-time basis as a field interviewer. Mr McMahon was 90 years of age when he stopped working. He then applied for an increase in his pension under the *Veterans' Entitlements Act 1986*.

The question for the Tribunal was whether Mr McMahon was entitled to the special rate of pension pursuant to section 24 of the Veterans' Entitlements Act. To be eligible, Mr McMahon was required to satisfy a number of criteria, including that:

- his war-caused conditions, of themselves alone, rendered him incapable of undertaking remunerative work for more than eight hours per week, and
- his war-caused conditions, alone, prevented him from continuing to undertake his last remunerative work.

Mr McMahon was suffering from a number of service-related conditions but relied primarily on war-caused hearing loss. He claimed his hearing problem caused him to stop working.

The Tribunal did not accept that Mr McMahon's age would prevent him from working. He had been working for the ABS until after his ninetieth birthday, many years beyond the normal span of a working life. On the evidence before it, the Tribunal was satisfied that it was Mr McMahon's hearing loss alone that rendered him incapable of working more than eight hours per week. However, the Tribunal decided it was unable to determine whether it was his war-caused hearing loss alone that had that effect. The evidence did not address whether age-related hearing loss was also a relevant factor. The Tribunal determined that additional evidence was required for it to make the correct or preferable decision.

Further evidence was obtained from an ear, nose and throat physician who concluded that a person with Mr McMahon's level of age-related hearing loss would be able to cope with the duties of a field interviewer. The Tribunal was satisfied that it was Mr McMahon's service-related hearing loss alone that prevented him from engaging in remunerative work and prevented him from continuing to undertake his last paid work as a field interviewer.

The Tribunal set aside the reviewable decision and determined that Mr McMahon was entitled to the special rate of pension.

Workers' compensation

Re Muscat and Comcare

[2008] AATA 872; 1 October 2008

Senior Member MD Allen; Dr JD Campbell, Member

Whether the applicant could claim compensation under the Safety, Rehabilitation and Compensation Act 1988 *following an award of damages made by the Dust Diseases Tribunal of New South Wales*

Mr Muscat was exposed to asbestos while he was employed by the Commonwealth. In 1999 he filed a statement of claim in the Dust Diseases Tribunal of New South Wales. The particulars of the injuries specified in the statement of claim included asbestosis and increased risk of developing lung cancer. In August 2003, Mr Muscat settled the action for damages against the Commonwealth for the sum of $165,000.

Mr Muscat developed lung cancer and made claims for compensation under the *Safety, Rehabilitation and Compensation Act 1988*. There was no dispute that the cancer was contributed to in a material degree by his employment by the Commonwealth. However, Comcare argued that Mr Muscat was not entitled to compensation because he had already received damages in respect of the injury of lung cancer.

Under the Safety, Rehabilitation and Compensation Act, compensation cannot be paid in respect of an injury if an employee has recovered damages in respect of that injury. Mr Muscat claimed that any damages in the lump sum award from the Dust Diseases Tribunal attributable to 'increased risk of developing lung cancer' were not damages in respect of an injury in respect of which compensation was payable under the Act.

The Tribunal found that the head of damage in Mr Muscat's statement of claim phrased as 'risk of developing lung cancer' was a notion peculiar to the Dust Diseases Tribunal and could not affect the definition of injury in the Safety, Rehabilitation and Compensation Act. The decision of the High Court in *Canute v Comcare* (2006) 226 CLR 535 had made clear that an injury in the terms of the Act means the resultant effect of an incident upon an employee's body. Mr Muscat's injuries were asbestosis and lung cancer. That Mr Muscat received damages for a head of damages otherwise unquantifiable, namely a risk of injury, did not result in part of the damages awarded being awarded 'in respect of' the actual injury when it did occur.

The Tribunal set aside the decisions under review. It determined that Mr Muscat was entitled to weekly compensation payments and to compensation for the permanent impairment resulting from the disease of lung cancer.

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