APPENDIX 7: DECISIONS OF INTEREST

These summaries of some of the more important or interesting Tribunal decisions, published during 2009–10, reflect the matters dealt with by the Tribunal.

Communications

Re Sublime IP Pty Ltd and Australian Communications and Media Authority

[2010] AATA 353; 13 May 2010

Deputy President RP Handley;
Senior Member N Bell

Whether a decision to issue a final link-deletion notice relating to a webpage classified R 18+ was contrary to the implied freedom of political communication – Whether the notice could be validly issued to Sublime IP Pty Ltd

Sublime IP Pty Ltd is an internet service provider (ISP) that provided web hosting services to Electronic Frontiers Australia (EFA). EFA is a non-profit association whose major objective is to protect and promote the civil liberties of users and operators of computer-based communications systems and of those affected by their use.

On 5 May 2009, the Australian Communications and Media Authority (ACMA) issued Sublime IP a 'link-deletion notice' to take such steps as necessary to ensure that either it ceased to provide a link from an EFA webpage to an Abortion TV webpage or that access to the webpage be made subject to a restricted access system. The EFA webpage consisted of an article titled 'Net censorship already having a chilling effect' and referred to the 'current net censorship regime' in the context of the Australian Government's proposals to introduce mandatory ISP filtering. The article referred to the power of the ACMA to restrict access to material that has been refused classification (RC) or rated R 18+ or X 18+. The article provided a hypertext link to the Abortion TV webpage which had been the subject of complaints to the ACMA. The Classification Board had subsequently classified the webpage R 18+.

There were two issues before the Tribunal: first, whether the decision to issue the final link-deletion notice was contrary to the implied freedom of political communication and therefore invalidated the ACMA's decision; and second, if the notice did not offend the implied freedom, whether the notice should have been issued to Sublime IP.

In relation to the first issue, the implied constitutional freedom of political communication had been recognised by the High Court. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the Court set out a two-stage test for determining whether a law infringes the freedom of communication. The first stage is whether the law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect. The second stage is, if it does, whether the law is reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally-prescribed system of representative and responsible government.

The Tribunal found that, while imposing restrictions on access to the internet could effectively burden communication about government or political matters, in this particular case the constraint was minor: the notice was not directed to preventing discussion of internet censorship or related issues of public policy and it did not effectively do so. The constraint imposed by the final link-deletion notice related to a hypertext link to the (offshore) Abortion TV webpage: the article's criticism of 'the current internet censorship regime' and the Government's proposal for mandatory filtering was otherwise unaffected.

The Tribunal noted that the right to vote in Australia is for people aged 18 and over. If the webpage was subject to a restricted access system, those who would still be able to access the webpage would be 18 and over. The Tribunal found that the notice was consistent with the classification of the webpage as R 18+ and the constraint was reasonably appropriate and adapted to serve the legitimate end of protecting minors.

In relation to the second issue, the Tribunal found that the notice was validly given pursuant to Schedule 7 to the *Broadcasting Services Act 1992*. Both Sublime IP and EFA were found to be links service providers of the Abortion TV webpage and it was therefore open to the ACMA to give a notice to either Sublime IP or EFA. While the preferable course may have been to give the notice to EFA, which deleted the link at Sublime IP's request, in the circumstances, it was for ACMA to determine how best to achieve its objective of restricting access to prohibited content. The decision under review was affirmed.

Customs

Australian Frozen Foods Pty Ltd and Chief Executive Officer of Customs

[2009] AATA 795; 15 October 2009

Member Webb

What customs tariff, if any, was payable in relation to the importation of gherkins in brine

Australian Frozen Foods Pty Ltd imported barrels of gherkins in brine (the imported goods). The imported goods were classified by the Australian Customs and Border Protection Service (Customs) under Chapter 20 of Schedule 3 to the *Customs Tariff Act 1995* as 'other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen' and consequently the imported goods incurred a 5 percent tariff. Australian Frozen Foods contended that the correct classification of the gherkins was under Chapter 7 of Schedule 3 as 'vegetables provisionally preserved … but unsuitable in that state for immediate consumption'. No tariff attaches to goods falling under that classification.

Australian Frozen Foods asserted that the process of preserving gherkins in a high salt solution was one commonly employed as an interim measure for transporting or storing gherkins, pending further processing and preparation for market. This further processing included washing the gherkins in fresh water for two to three days, spicing, slicing, hermetically sealing and heat treating the gherkins.

Arguing that the term 'provisionally preserved' was ambiguous, Customs relied upon the Harmonized System Explanatory Notes (HSEN) made under the *International Convention on the Harmonised Commodity Description and Coding System* to claim that the imported goods were not 'provisionally preserved' because lactic fermentation, an irreversible process, had taken place.

The Tribunal concluded that immersion in brine was a provisional preservation process. Gherkins were used as a raw material in the manufacture of sliced gherkins and the immersion in brine was an interim preservation process pending further preservation. The non-technical term 'provisionally preserved' was neither ambiguous nor would use of the ordinary meaning give rise to a result that was manifestly absurd or unreasonable. Therefore, reliance on the HSEN to elucidate the meaning of 'provisionally preserved' was neither justifiable nor necessary. Furthermore, the HSEN introduced tariff classifications that went beyond or purported to limit the scope of the legislative provisions that had been enacted and could not be preferred so as to overwrite the express language of the statute or used to create doubt about the meaning of a provision.

The Tribunal set aside the decision and substituted a decision that the gherkins should be classified under Chapter 7 of Schedule 3 to the Customs Tariff Act.

Practice and procedure

Re Mellor and Australian Postal Corporation

[2010] AATA 288; 22 April 2010

Justice GK Downes, President; Dr I Alexander, Member

How the Tribunal should be constituted when a matter is remitted from the Federal Court of Australia – Whether a member should recuse himself or herself from rehearing a matter

The Tribunal, constituted by Dr Alexander, conducted a hearing and affirmed a number of decisions that were under review. Mr Mellor appealed to the Federal Court against part of the Tribunal's decision. Bennett J found that the Tribunal had made an error of law on a narrow question and remitted the matter to the

Tribunal without any direction as to how the Tribunal should be constituted.

The President determined that the matter should be returned to Dr Alexander for rehearing. At the beginning of the rehearing, Mr Mellor made an application under section 21A of the Administrative Appeals Tribunal Act for Dr Alexander to recuse himself.

Section 21A permits a party to 'apply to the Tribunal as constituted … requesting that the Tribunal be reconstituted'. The Tribunal is obliged to notify the President of the application and the particulars of the submissions made by the parties. The President has a discretion to reconstitute the Tribunal 'if he or she considers that the matters to which the proceeding relates are of such public importance as to justify him or her in so doing'.

The basis of the section 21A application was apprehended bias. It was submitted that findings made by Dr Alexander as to Mr Mellor's credit and as to the weight of medical evidence led to apprehended bias in rehearing the matter.

The Tribunal found that section 21A did not permit the President to reconstitute the Tribunal in any circumstance other than that set out in the section. The Tribunal was satisfied there were no circumstances of sufficient public importance to justify reconstituting the Tribunal.

Nonetheless, as the Tribunal is bound by the rules of natural justice and needed to consider the application as to apprehended bias. The Tribunal noted that a remittal based on a technical error of law should not afford an applicant the opportunity to revisit a factual matter on which he or she was unsuccessful the first time around. Simply because a member makes an observation relating to credit, a fair minded lay observer would not apprehend that the member might not bring an impartial and unprejudiced mind to the resolution of the matter.

The Tribunal found that Dr Alexander should not recuse himself.

Social security

Re Ogilvie and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs

[2010] AATA 187; 19 March 2010

Senior Member J Handley

Whether Mr Ogilvie was entitled to an Australian Government Disaster Recovery Payment as a result of the Victorian bushfires in 2009

Mr Ogilvie was living with his parents in regional Victoria in March 2009. On 2 March 2009, he received a text message from Victoria Police warning of the risk of fire as a result of unprecedented and disastrous conditions. Local schools were closed, 140 km/hr winds were forecast with high temperatures and residents were advised to evacuate. Mr Ogilvie's home was located at the end of a dead-end gravel road and in a poor position from which to fight a fire. Smoke and flames were visible one kilometre away and the Elvis helicopter, which was attempting to extinguish the fires, could be observed from the property. He left the property on 2 March 2009 and returned on 5 March 2009.

Section 1061K of the *Social Security Act 1991* sets out the qualification requirements for the Australian Government Disaster Recovery Payment (the payment). One of the requirements is that a person is 'adversely affected by a major disaster'. The Victorian bushfires were declared to be a major disaster in the *Social Security (Australian Disaster Recovery Payment) Determination 2009 (No 4)* (the Determination). The Determination also prescribed the circumstances in which persons were taken to be adversely affected. These included serious injury, inability to return to a place of residence, utility failure and the experience of psychological trauma.

Mr Ogilvie argued that he was adversely affected by a major disaster because he was unable to return to his principal place of residence for 24 hours or more and, in the alternative, he experienced a psychological trauma.

Although the Tribunal was satisfied that the house in which Mr Ogilvie resided with his parents was his principal place of residence, the Determination provided that an inability to return to one's principal place of residence must be 'supported by the evidence'. Mr Ogilvie did not provide reasons for his inability to return to his house for three days. The Secretary provided material from the Country Fire Authority (CFA) which indicated it was not called to any incidents in the area and there were no road closures. On the basis that there was no prohibition or restraint by the CFA and no fires to prevent return, the Tribunal was satisfied that Mr Ogilvie was not unable to return to his principal place of residence for 24 hours or more.

The Determination defined the circumstances in which a person would be taken to have experienced psychological trauma. This included if a person was in the immediate area of the disaster and 'as a direct result of the disaster, the individual's principal place of residence … was under immediate threat'. The definition did not require medical proof and diagnosis or actual destruction by fire. In view of the extreme weather conditions, the school closures, the warnings issued by the police by text message and the position of his house in a dead-end street, the Tribunal was satisfied that he was in the immediate area of the disaster. As a direct result of the disaster, Mr Ogilvie's principal place of residence was under immediate threat. The reviewable decision was set aside and in substitution it was decided that Mr Ogilvie was entitled to the payment.

Re Secretary, Department of Families, Housing, Community Services and Indigenous Affairs and de Waal

[2009] AATA 635; 26 August 2009

Deputy President DG Jarvis

Whether Mr de Waal was entitled to an economic security strategy payment

On 14 October 2008 the Australian Government announced a strategy for strengthening the economy in the face of the global financial crisis. One of the measures was to make economic security strategy payments (ESS payments) to Australia's pensioners, carers and seniors. Parliament subsequently enacted the *Social Security and Other Legislation Amendment (Economic Security Strategy) Act 2008* to implement the ESS payments. Section 900 of the Social Security Act, as inserted by the amending legislation, provided that a person was qualified for an ESS payment if 'the person was receiving … in respect of 14 October 2008 … a disability support pension'.

Mr de Waal was qualified to receive a disability support pension (DSP) in 2008. However, during the 14-day period which ended on 27 October 2008, he was engaged in seasonal work and his earnings exceeded the relevant income test limit under the Social Security Act. His rate of DSP for the period, which included 14 October 2008, was therefore nil. As a result, he was not paid DSP for the period.

Mr de Waal's claim for the ESS payment was refused, a decision affirmed by an authorised review officer. He then applied to the Social Security Appeals Tribunal (SSAT) which decided that he had been 'receiving' DSP during the relevant period within the meaning of the legislation and therefore qualified for the payment. The Secretary sought review of the SSAT's decision.

The Tribunal considered the relevant legislation and observed that 'receiving' denoted a continuing situation. The Tribunal decided that it followed from the ordinary meaning of the words used in the amending legislation, as aided by various other interpretative provisions in the Social Security Act, that, for the period during which Mr de Waal's DSP entitlement was nil, DSP was not payable. The Tribunal rejected the argument made on behalf of Mr de Waal that DSP was a unitary payment paid in instalments over a period of time, and decided that the effect of the above sections was that Mr de Waal was not receiving DSP for the period including 14 October 2008.

The Tribunal recognised that the outcome was unfortunate, but observed that it was inevitable that the eligibility criteria for economic security strategy payments would exclude some people, a fact which could not affect the proper interpretation of the legislation. The Tribunal set aside the decision and, in its place, decided that Mr de Waal was not entitled to an economic strategy payment.

Taxation

Re News Australia Holdings Pty Ltd and Commissioner of Taxation

[2009] AATA 750

Justice GK Downes, President;
Senior Member S Frost

Whether a global corporate restructure of the News Group was for the dominant purpose of obtaining a tax benefit such that the benefit should be cancelled

News Australia Holdings Pty Ltd, an Australian registered company, was one of several companies involved in a corporate restructure of the News Groups' various international trading entities. News Australia Holdings and several related entities conducted a series of transactions on 8 June 2005 referred to as the 'second spin'. It entered into a buy-back arrangement with News Publishing, the company holding the Group's UK assets, whereby its shares in News Publishing were converted into a liability represented by a note. The corresponding asset, being the benefit of the note, was distributed to the News Australia's substantial shareholder, News Corporation Inc, the corporation intended to hold News Publishing's assets. This asset was then used to subscribe for shares in a US company which merged with News Publishing. A capital loss of $1.5 billion was incurred by News Australia Holdings as a consequence.

The Commissioner characterised this arrangement as a 'scheme' to which Part IVA of the *Income Tax Assessment Act 1936* applied: namely, a scheme entered into with the dominant purpose of obtaining a tax benefit under section 177D. The Commissioner accordingly sought to cancel the tax benefit accruing from News Australia Holding's capital loss. News Australia Holdings sought review of this determination by the Tribunal.

The parties concurred that a tax benefit had been obtained through the scheme. The Tribunal therefore proceeded to apply the factors, enumerated in section 177D, to the question of whether the transactions were undertaken for the dominant purpose of obtaining a tax benefit. The Tribunal made the following findings: the structure of the scheme was geared more towards removing uncertainties about transnational taxation implications than incurring a capital loss; the form and substance of the scheme was that of a real transaction with the aim of restructuring ownership arrangements in the News Group entities to give pre-eminence to the American parent; the scheme did not precipitate a change in the financial position of the News Group as a whole; and the scheme entailed commercial benefits for News Australia Holdings.

The Tribunal concluded that the principal motivation underlying the form of the transaction was commercial, in the sense of obtaining a more efficient corporate structure which took into account transnational taxation obligations. This did not objectively point to an arrangement being entered into for the dominant purpose of obtaining a tax benefit. The objection decision of the Commissioner was accordingly set aside and a decision substituted not to determine that the capital loss in issue was not incurred by the taxpayer.

(An appeal against this decision was dismissed by a Full Court of the Federal Court on 30 June 2010: *Commissioner of Taxation v News Australia Holdings Pty Limited* [2010] FCAFC 78.)

Veterans' affairs

Re Ryan and Repatriation Commission

[2010] AATA 230; 31 March 2010

Senior Member J Toohey; Dr M Thorpe, Member

Whether the widow of a veteran was entitled to a pension

Mr Ryan served in the Australian Army from March 1944 to November 1946. He died in July 1999 from injuries sustained when he was hit by a car while crossing a road. The police report noted that Mr Ryan crossed a busy road with traffic travelling at 80 kilometres per hour against a Don't Walk sign, and away from marked pedestrian lines. According to the death certificate, the causes of death were skull fracture, cerebral haemorrhage and massive blood loss. Mrs Ryan claimed a widow's pension on the basis that her husband did not hear the car approaching due to his

sensorineural hearing loss which was, she claimed, related to his war service.

Mrs Ryan was entitled to a widow's pension if her husband's death was 'war-caused' within the meaning of the *Veterans' Entitlements Act 1986*. To establish this, there had to be a reasonable hypothesis connecting his death with his service. The Act also provides, however, that a death is not war-caused if it resulted from the veteran's serious default or wilful act occurring after war-service.

Before his death, Mr Ryan was receiving a service pension, which included benefits such as hearing aids and related treatment. He was not receiving, however, a disability pension for any war-caused hearing loss.

The Repatriation Commission refused Mrs Ryan's claim for a pension. On review, the Veterans' Review Board accepted that Mr Ryan's exposure to noise during his service would have caused his hearing loss. However, it determined that he was at serious default in crossing the road in those conditions.

The Tribunal found there was no evidence in Mr Ryan's service records, or provided by Mrs Ryan, which pointed to him being exposed to the kind of noise that would lead to sensorineural hearing loss. Therefore, the hypothesis that Mr Ryan's hearing loss was war-caused could not be demonstrated to be more than a mere possibility. It followed that the hypothesis was not reasonable. Even if the material before the Tribunal pointed to a connection between Mr Ryan's service and his hearing loss, it did not point to a connection with the circumstances of his kind of death.

Although it was not required to do so, the Tribunal considered and dismissed the Commission's argument that Mr Ryan's death was the result of a 'wilful act'. The Tribunal held that 'wilful' connotes conduct that is intentional or that at least apprehends its consequences. The Tribunal could not conclude that Mr Ryan's behaviour was wilful. The actions leading to Mr Ryan's death were inexplicable but, the Tribunal concluded, that was very different from finding that his death was the result of a wilful act. The Tribunal affirmed the decision under review.

Workers' compensation

Re Carpenter and Comcare

[2010] AATA 62; 29 January 2010

Deputy President DG Jarvis

Whether Mr Carpenter's generalised anxiety disorder was contributed to by employment in a material degree

In November 1990, Mr Carpenter suffered a breakdown due to a stress-related illness. Comcare accepted Mr Carpenter's claim for compensation for a temporary aggravation of a chronic underlying anxiety condition but in 1991 decided it was no longer liable to pay compensation.

In April 2006, Mr Carpenter lodged a further claim for his underlying generalised anxiety disorder, which he claimed had arisen from his employment as a result of maladministration of the transfer system, victimisation, bullying and harassment of observers. Comcare rejected this claim in December 2006 and again on reconsideration in June 2007. Mr Carpenter made an additional claim for permanent impairment in respect of generalised anxiety disorder, depression, panic attacks, irritable bowel and frequent cold sores and tension headaches. Comcare also rejected this claim.

The *Safety, Rehabilitation and Compensation Act 1988* provides that an employer is liable to pay compensation when an employee suffers an *injury* if it results in death, incapacity for work or impairment. 'Injury' is defined to include a disease, that was contributed to, in a material degree, by the employee's employment. It excludes any disease or injury suffered by an employee as a result of failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.

The issues to be determined by the Tribunal were:

1) whether Mr Carpenter's employment made a 'material contribution' to his generalised anxiety disorder

2) whether Mr Carpenter's generalised anxiety disorder was the result of failure by him to obtain a transfer or benefit in connection with his employment

3) if Comcare was liable to pay compensation in respect of Mr Carpenter's generalised anxiety disorder, whether he suffered a permanent impairment as a result of his compensable injury and, if so, the degree of that impairment.

The Tribunal found that, on the evidence, Mr Carpenter's perceptions of events and practices at his place of employment did make a material contribution to the onset of his psychiatric disorder in 1990. The Tribunal noted that while other non-work-related matters also contributed to his condition, liability was not negated by such other non-compensable concurrent causes.

The Tribunal found that Mr Carpenter's anxiety condition was not suffered as a result of his failure to obtain claimed allowances, nor was it the result of his failure to obtain the benefit of a permanent transfer overseas, the latter labelled by the Tribunal as a 'minor but not a material contribution to the development of his anxiety condition in 1990'. Following a review of authorities, the Tribunal concluded that the exceptions to injury, such as the failure to obtain a transfer, did not apply if they did not contribute in a material degree to the disease.

The Tribunal set aside the decisions under review and, in their place, decided that Comcare was liable for the condition of generalised anxiety disorder. The Tribunal assessed Mr Carpenter's degree of permanent impairment at 10 percent.

Re Courtis and Linfox Armaguard Pty Limited

[2009] AATA 809; 22 October 2009

Senior Member GD Friedman

Whether Mr Courtis should be denied compensation for an injury sustained when he kicked a trolley

Mr Courtis had been employed by Linfox Armaguard Pty Limited (Linfox) for more than 30 years. He injured his left wrist and hand at work. Two months later, while at work, he knocked his injured hand on a trolley, causing immediate and severe pain. Mr Courtis kicked the trolley in frustration, striking it with the sole of his right foot, fracturing a bone as a result. Linfox refused Mr Courtis's claim for compensation for injury to his foot on the basis that he had voluntarily placed himself in a position of abnormal risk of injury.

The Safety, Rehabilitation and Compensation Act provides that an employer is liable to pay compensation when an employee suffers an *injury* if it results in death, incapacity for work or impairment. Section 5A defines injury to include an injury suffered by an employee 'arising out of, or in the course of, the employee's employment'. Section 6(1) of the Act provides that an injury is taken to have arisen out of, or in the course of, employment when it is suffered in specified circumstances, including section 6(1)(b) which addresses injuries suffered while the employee was at the employee's place of work. Section 6(3) provides that section 6(1) does not apply if the employee sustained the injury because he voluntarily and unreasonably submitted to an abnormal risk of injury.

The Tribunal first considered whether section 6(3) was relevant to the application. Mr Courtis submitted it was not relevant on the basis that there was no need to go to section 6 if Mr Courtis fell within the scope of injury as defined in section 5A. Linfox submitted that section 6 was not an extension provision: its purpose was to provide specific examples of situations where an injury to an employee may be treated as 'arising from, or in the course of, employment'. Section 6(1)(b) applied to Mr Courtis and it followed that section 6(3) prevented compensation because he had voluntarily and unreasonably submitted to an abnormal risk of injury.

The Tribunal did not accept that any injury occurring at work is subject to the section 6(3) exclusion as that would detract from or limit the operation of the definition of injury in section 5A. Section 6(1) clarifies situations in which an injury will be taken to have arisen for the purposes of the Act; it gives an extended meaning to the definition of 'arising out of, or in the course of, employment' in situations where there may otherwise be some doubt. Consequently, there was no need for the Tribunal to refer to section 6 because Mr Courtis's circumstances clearly fell within the meaning of injury as defined in section 5A. The Tribunal found that Mr Courtis was at his normal place of work and was engaged in his

usual duties when the injury occurred. The Tribunal did not accept that kicking the trolley was an act that took Mr Courtis outside the scope of the course of his employment.

Although it was not necessary to consider the application of section 6(3), in light of the authorities, the Tribunal found that the act of kicking the trolley in frustration did not constitute an unusual risk of injury and was not inherently dangerous. It was an instinctive and impulsive action and Mr Courtis did not have time to contemplate his action.

The Tribunal set aside the reviewable decision and found that Mr Courtis was entitled to compensation.