APPENDIX 7: DECISIONS OF INTEREST

CITIZENSHIP

TODD AND MINISTER FOR IMMIGRATION AND CITIZENSHIP

[2011] AATA 851; 1 December 2012

Justice GK Downes, President

Whether the applicant was eligible for Australian citizenship – Whether his bridging visa 'ceased to have effect' when he departed Australia such that he later became an unlawful non-citizen

Mr Todd, a citizen of the United Kingdom, came to Australia in 2006 on a long stay business visa. That visa permitted him to leave and re-enter the country. He left Australia in October 2009 for one week while his business visa was still in operation. Prior to leaving, Mr Todd had applied for an employer nomination visa. As a result, he also received a bridging visa which was to operate between the expiry of the business visa and the decision on the employer nomination visa application. That visa was subsequently granted.

In January 2011, Mr Todd applied to become an Australian citizen. However, his application was refused on the grounds that he had been an unlawful non-citizen for a period during the four years prior to his application. The Department of Immigration and Citizenship found that Mr Todd's departure in 2009, though lawful under his business visa, had led to the revocation of the bridging visa. This resulted in a gap of 11 days in December 2009 between the expiry of the business visa and the grant of the employer nomination visa during which he was an unlawful non-citizen.

The Department argued before the Tribunal that the relevant provisions of the *Migration Act 1958* should be interpreted to mean that the bridging visa had effect when it was granted and ceased to have effect when Mr Todd left Australia. Previous decisions of the Tribunal in similar cases had reached different views on the effect of the provisions.

The Tribunal held that the words of the Act did not cause the bridging visa to cease to be in effect or prevent it from coming into effect in the circumstances of this case. Mr Todd's departure and return in October 2009 had no reference to his bridging visa which did not come into effect until after his business visa expired. The Tribunal noted that a primary goal of government decision making is good government. It would not be good administration to authorise conduct on the one hand – departure and return under a visa – and penalise a person for taking advantage of that authorisation on the other.

The Tribunal set aside the reviewable decision and remitted the matter to the Department for grant of citizenship.

CONSUMER CREDIT REGULATION

RENT TO OWN (AUST) PTY LTD AND AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

[2011] AATA 689; 6 October 2011

Justice GK Downes, President; Deputy President PE Hack SC

Whether Rent to Own (Aust) Pty Ltd should be granted an Australian credit licence under the National Consumer Credit Protection Act 2009 – Whether the Tribunal has a discretion to grant a licence with conditions which would adequately protect the public interest

Mr Tapping was a director and the controlling mind of Rent to Own (Aust) Pty Ltd. He held a similar position with Cash on Tap Pty Ltd (previously called Aussie Payday Loans Pty Ltd). Both businesses involved the provision of credit to consumers.

On 1 July 2011, it became necessary for operators of such businesses to have an Australian credit licence granted under the *National Consumer Credit Protection Act 2009*. The Australian Securities and Investments Commission (ASIC) refused to grant Rent to Own a licence because they had reason to believe that Mr Tapping was likely to contravene certain obligations under the Act. Mr Tapping sought a review of ASIC's decision.

Mr Tapping, as director of Rent to Own and Cash on Tap, had previously made undertakings accepting that the corporations had contravened the *Consumer Credit (Queensland) Act 1994* (the Code). Aussie Payday Loans was also prosecuted in the Queensland Magistrates Court. When completing Rent to Own's application for a credit licence, Mr Tapping did not disclose these matters. Mr Tapping maintained that he had done no wrong.

The Tribunal found that Mr Tapping, as the controlling mind of Rent to Own and Cash on Tap, had been responsible for making numerous contracts containing multiple contraventions of the Code, including the charging of excessive interest rates. This series of breaches represented a pattern of conduct and Mr Tapping did not take steps to discover what his obligations were and how they could be performed. Accordingly, the Tribunal found there was reason to believe that Rent to Own would likely contravene its obligations under the Act if granted a licence.

The Tribunal considered whether the public interest could be adequately protected by a grant of a licence with conditions and found that this was not the case. The Tribunal reasoned that the central consideration in discretionary administrative decision making is good regulation and good administration, not an overanxious desire to permit regulated activity wherever possible. The Tribunal decided that it was up to Mr Tapping to bring about the changes to enable qualification for a licence and not up to ASIC or the Tribunal to seek to rehabilitate him by imposing certain conditions.

The Tribunal reached the view that Rent to Own should remain bound by its existing contracts and was entitled to receive payments under them. The Tribunal set aside the decision under review and decided that a licence should be granted but limited to performing and enforcing existing contracts.

CULTURAL HERITAGE PROTECTION

BRINSMEAD AND MINISTER FOR THE ARTS

[2011] AATA 753; 26 October 2011

Deputy President JW Constance; Mr C Ermert, Member

Whether an export permit should be granted for a steam locomotive – Whether its loss would significantly diminish the cultural heritage of Australia

Mr Brinsmead was the owner of a 1914 Marshall steam road locomotive manufactured in England in 1914. The *Protection of Movable Cultural Heritage Act 1986* required that he obtain a permit if he wanted to export the locomotive. The Act provides that the Minister shall not grant an export permit if satisfied that the object is of such importance to Australia, or a part of Australia, that its loss to Australia would significantly diminish the cultural heritage of Australia. The Minister refused to issue the export permit.

As required by the Act, the Minister had referred the application for the permit to the National Cultural Heritage Committee (the Committee) which, in turn, referred the application to two expert examiners. The material before the Tribunal included reports from the two expert examiners and the recommendations of the Committee.

The expert examiners considered the locomotive was a rare surviving example of this type of engine and that nothing of equivalent quality was held in public collections in Australia. It was also said to be significant for its association with the Hillgrove mining field in northern New South Wales. They considered its export would negatively affect its potential contribution to research and interpretation of key historic themes and significant industries during the early 20th century. Both experts recommended that the export permit be refused. The Committee agreed with the expert examiners.

The Tribunal found that both expert examiners were very experienced in their respective fields and had provided detailed and well-reasoned reports. The Tribunal did not agree with submissions made on behalf of Mr Brinsmead that the documentation in respect of the locomotive was not strong and that there are a number of machines of similar quality in Australia. The Tribunal accepted that the locomotive has a particular provenance and fulfilled a particular role in the Hillgrove area.

The Tribunal was satisfied that the locomotive is of such importance to Australia, or alternatively to the Hillgrove area in northern New South Wales, that its loss would significantly diminish the cultural heritage of Australia. The Tribunal affirmed the decision under review.

CUSTOMS

ALDI STORES (A LIMITED PARTNERSHIP) AND CHIEF EXECUTIVE OFFICER OF CUSTOMS

[2012] AATA 151; 8 March 2012

Deputy President RP Handley

Whether the applicant's products imported into Australia were disposable pants rather than nappies and therefore not subject to import duty

In 2008, Aldi Stores (A Limited Partnership) successfully applied under the *Customs Act 1901* for a tariff concession order in respect of disposable pants for babies and toddlers. The effect of the order was that no duty was payable on those goods. The order contained a description of the goods to which it applied: disposable pants comprising pre-fastened and/or re-fastenable stretch side panels, delayed fluid absorbency and outer cover graphics. The order stated they were for use by small children to assist with toilet training.

In 2010, Aldi applied to the Australian Customs and Border Protection Service (Customs) for a tariff advice in relation to another type of goods described as 'Disposable pants Mamia brand re-fastenable and prefastened', contending that the tariff concession order applied to those goods. The goods were marketed by Aldi as 'Mamia Toddler Unisex Nappies'. Customs decided that the order did not apply as the goods did not meet the description. Aldi paid duty under protest and applied to the Tribunal for review of the decision.

The Tribunal observed that the task of a decision maker in this type of case is to ascertain the identity of the goods as at the time of their importation and as they would present themselves to an informed observer. This determination must be made objectively without reference to the intentions of the manufacturer, the exporter or the importer. The material before the Tribunal included evidence from an expert in textile technology as well as evidence from the product development manager for baby and child care products from a competitor of Aldi.

The Tribunal considered that an examination of the goods in question by an informed observer would indicate their principal purpose was to absorb and contain a child's excrement. It noted that the packaging described the goods as 'nappies' with no reference to the word 'pants' and the goods appeared to have the characteristics of nappies. They were supplied with the sides in an unfastened state and appeared intended to be placed around a child when the child was lying down.

The Tribunal held that the reference in the tariff concession order to the stated use of disposable pants – to assist children in toilet training – confirmed that the meaning of 'pants' in that order was not that of ordinary nappies. The Tribunal was satisfied that an informed observer would conclude that the goods in question should be identified as disposable nappies and not as pants. Even if they could be identified as pants, the Tribunal found that they did not have stretch side panels or delayed fluid absorbency. As the goods did not meet the description under the tariff concession order, the Tribunal affirmed the decision under review.

ENERGY AND FUEL GRANTS

AUTECH MINING PTY LTD AND COMMISSIONER OF TAXATION

[2011] AATA 821; 18 November 2011

Senior Member C Walsh

Whether the applicant was entitled to claim credits for diesel fuel purchased for use in its operations

Autech Mining Pty Ltd claimed off-road credits and fuel tax credits for diesel fuel purchased for use in its front-end wheel loaders. The front-end loaders were used to load iron ore from stockpiles within storage sheds at the Port of Esperance in Western Australia onto hoppers. The hoppers directed the ore onto conveyor belts which transported the ore out to a ship berthed at port for loading. As part of the process of loading the ore onto the hoppers, different classes of ore were blended according to customer specifications.

The Australian Taxation Office decided that Autech was not entitled to the off-road credits claimed for the period 15 July 2003 to 7 July 2006 and fuel tax credits claimed for the period 1 July 2006 to 30 June 2008. The central issue for determination by the Tribunal was whether Autech's operations were mining operations pursuant to section 11 of the *Energy Grants (Credits) Scheme Act 2003* and, in particular, whether Autech's operations in the storage sheds constituted 'beneficiation' of the ore within the meaning of the Act.

The Tribunal noted that the relevant provisions of the Act had previously been found in the *Customs Act 1901*. The Tribunal referred to the Second Reading Speech to the Bill that introduced those earlier provisions in which it was stated that the intention was not that the legislation should be defined broadly and beneficially. Amendments to the various definitions, particularly 'beneficiation', were intended to make it clear that, while the physical act of mining or beneficiation is eligible for rebate, activities that are said to be integral to, associated with or connected with these activities are not eligible.

The evidence before the Tribunal was that the blending of different classes of ore carried out by Autech was 'tweaking' of the ore 'product' for delivery in accordance with the terms of its contract. The Tribunal noted that the Act provided that, in determining whether a particular process constitutes beneficiation, regard must be had to the nature of the technical process but no regard is to be had to any market considerations that might affect the decision to subject that mineral or those ores to that process. The Tribunal found that the blending at port was a deliberate process designed to make the product loaded on the ship more marketable by meeting customer specifications and, therefore, must be disregarded in determining whether there was a process of beneficiation.

The Tribunal concluded that Autech's operations at the port did not constitute beneficiation and were therefore not mining operations within the meaning of the Act. Autech was not eligible for the off-road credits and fuel tax credits. The Tribunal affirmed the decisions under review.

FINANCIAL SERVICES REGULATION

FRASER AND AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

[2011] AATA 944; 19 December 2011

Deputy President PE Hack SC; Dr KS Levy RFD, Senior Member

Whether the applicant should be banned permanently from providing financial services

Mr Fraser worked as a financial planner, acting as an authorised representative of Bridges Personal Investment Services (Bridges). In June 2011, the Australian Securities and Investments Commission (ASIC) imposed a banning order on Mr Fraser, permanently banning him from providing a financial service on the basis that he had not complied with a financial services law, there was reason to believe he would not comply with a financial services law in the future and there was reason to believe he was not of good fame and character.

Mr Fraser's arrangement with Bridges involved a base salary plus a proportion of the fee paid by customers for the preparation of financial plans. The balance of the fee was shared between the building society which made referrals to Mr Fraser and Bridges. On 37 occasions between April 2006 and May 2008, Mr Fraser failed to account to Bridges and the building society for their percentage of fees. Mr Fraser falsely noted on the fee invoice that the fee had been waived. Mr Fraser's business partner suggested Mr Fraser advise Bridges of what he had been doing and Mr Fraser did so. After an investigation, Mr Fraser's authority to act for Bridges was revoked.

The Tribunal examined the circumstances surrounding Mr Fraser's dishonest conduct, the likelihood of his not complying with a financial services law in the future and whether he was of good fame and character. The Tribunal found that a more charitable view should be taken of Mr Fraser's conduct as the amount of money involved in the impugned conduct was quite modest, the conduct was undertaken at a time when Mr Fraser was quite new to the industry, and the conduct should be considered by reference to his unblemished conduct before and after the period of misconduct. The Tribunal found Mr Fraser's conduct, while dishonest, was out of character and did not provide reason to believe he was not of good fame and character.

The Tribunal found that the dishonesty of Mr Fraser's conduct was at the lower end of the scale of seriousness, and Mr Fraser demonstrated an intention to comply with his obligations in the future. The Tribunal varied the decision and imposed a banning order of six months.

FREEDOM OF INFORMATION

PHILIP MORRIS LIMITED AND PRIME MINISTER

[2011] AATA 556; 15 August 2011

Deputy President SA Forgie

Whether certain documents held by the Office of the Prime Minister in relation to the plain packaging of tobacco products were exempt from disclosure under the Freedom of Information Act 1982

Under the *Freedom of Information Act 1982*, Philip Morris Limited asked the Prime Minister for access to documents relating to the plain packaging of tobacco products. Philip Morris challenged the decision made on its request only in so far as it refused access to five documents, either in whole or in part, on the basis that they were subject to legal professional privilege and so exempt under section 42 of the Act, or exempt under section 36. The claims for exemption related to, or to references in other documents to, a 'Legal Advice' prepared by the Department of Foreign Affairs and Trade (DFAT) (DFAT advice) and an 'Advice' prepared by the Australian Government Solicitor (AGS) (AGS advice).

Both advices had been prepared at the request of the Department of Health and Ageing (DHA). The requests had been directed to AGS and DFAT according to the directions given in Appendix A of the Legal Services Directions made by the Attorney-General under the *Judiciary Act 1903*. The Tribunal rejected a submission that legal professional privilege necessarily attaches to Commonwealth legal work tied to an agency under those directions.

The Tribunal characterised both advices as legal advices that had been given for the dominant purpose of responding to DHA's request for legal advice. The AGS advice had also been prepared and given in the course of a professional and independent relationship of solicitor and client. Consequently, the AGS advice was subject to legal professional privilege and exempt under section 42.

The Tribunal was not satisfied that the necessary professional independent relationship existed between DFAT and DHA because: part of the DFAT advice was prepared by officers who were admitted legal practitioners and part by officers who were either not admitted or did not have a law degree; and documents relating to their legal advice were not quarantined from policy and other areas of DFAT.

The DFAT advice was, however, subject to legal professional privilege and exempt under section 42 of the Act because DHA had mistakenly (but reasonably in view of the Legal Services Directions) believed that it was seeking advice from a lawyer or legal practitioner.

Disclosure of the advices was limited to the Prime Minister and others within the Commonwealth administration having direct interests in plain tobacco packaging policy. The privilege, which belongs to the Commonwealth, had not been waived.

The Tribunal also found that both advices met the requirements of section 36(1)(a) of the Act. Their disclosure would be contrary to the public interest only because to do so would be a breach of legal professional privilege. Therefore, they were exempt under section 36 of the Act.

The Tribunal affirmed the decision under review.

LEASES ON NATIONAL LAND

EMBASSY OF BELGIUM AND MINISTER FOR REGIONAL AUSTRALIA, REGIONAL DEVELOPMENT AND LOCAL GOVERNMENT; EMBASSY OF FINLAND AND MINISTER FOR REGIONAL AUSTRALIA, REGIONAL DEVELOPMENT AND LOCAL GOVERNMENT

[2012] AATA 238; 27 April 2012

Justice GK Downes, President; Mr S Webb, Member

Whether increases in the annual rent payable for the land on which the Belgian and Finnish embassies are located were properly calculated

The Kingdom of Belgium and the Republic of Finland hold 99-year Crown leases over two parcels of diplomatic mission land in the Australian Capital Territory on which their embassies are located. In 2011, the Minister for Regional Australia, Regional Development and Local Government undertook reappraisals of the unimproved value for rental purposes of the land on which the Belgian and Finnish embassies stand in accordance with the *Leases (Special Purposes) Ordinance 1925* (ACT). A reappraisal of this kind must be undertaken every twentieth year following commencement of a lease and rent paid under the lease is calculated at two per cent of the unimproved value of the land. The 2011 reappraisals led to an increase in annual rent payable for both the Belgian and Finnish embassies. They applied to the Tribunal for a review of those decisions.

The applicants submitted that, as the diplomatic leases were restricted to the named country alone, the leases were non-tradeable and there would be no market for the leased lands. For this reason, the value of the leases could not be determined according to usual market-based principles and should be nominal or nil in value.

The Tribunal determined that, even if each hypothetical 'sale' is confined to the actual lessees, it must proceed on the basis that each lessee is a willing but not overanxious purchaser and the Minister is a willing but not overanxious vendor. Even though the demand for, and supply of, diplomatic mission land may not accord with the traditional conception of a market, it is not correct to proceed on the basis that there is no market whatsoever.

The Tribunal noted that a country seeking to establish a diplomatic mission is not confined to doing so on designated diplomatic mission land but may privately acquire land that is subject to land use and zoning restrictions. Therefore, the Tribunal concluded that, in order to determine the unimproved value, regard must be had to market variables – such as demand, supply and sales of comparable land – as well as the particular attributes of the land and the terms of the lease.

The Tribunal undertook a comparative analysis with reference to sales of comparable diplomatic, community facility and residential lands, and had regard to the relative size, location and topography, development potential and zoning of the land leased by Belgium and Finland. The Tribunal concluded that substantial value attached to the Belgian and Finnish land, rejecting the proposition that the leases had nil or a nominal value only. The Tribunal affirmed the decisions under review.

MILITARY COMPENSATION

KERMODE AND MILITARY REHABILITATION AND COMPENSATION COMMISSION

[2012] AATA 188; 2 April 2012

Deputy President DG Jarvis, Professor D Ben-Tovim, Member

Whether the applicant's service on HMAS Melbourne at the time of its collision with HMAS Voyager on 10 February 1964 materially contributed to the applicant's claimed conditions of post-traumatic stress disorder, claustrophobia and alcohol abuse

Mr Kermode was a steward on board HMAS Melbourne when it collided with HMAS Voyager on 10 February 1964. It was Australia's worst peacetime naval disaster. Mr Kermode began receiving treatment for post-traumatic stress disorder (PTSD) and claustrophobia in 1997. In the same year, he lodged an application for compensation under the *Safety, Rehabilitation and Compensation Act 1988* for PTSD, claustrophobia and alcohol abuse, which he claimed were caused by the collision. The Military Rehabilitation and Compensation Commission accepted Mr Kermode's claim for these conditions in July 1997, determining that his military service had contributed in a material degree to the conditions.

In November 2003, Mr Kermode claimed compensation for permanent impairment. After referring him to a consultant psychiatrist for assessment, the Commission determined in January 2007 that he had no present entitlement to compensation for medical expenses, weekly incapacity payments, permanent impairment, or household and attendant care services. In August 2007, the Commission made a further decision to revoke its 1997 determination to accept liability. Mr Kermode sought review by the Tribunal of the Commission's decisions.

In 1995, Mr Kermode had lodged proceedings against the Commonwealth in the Supreme Court of New South Wales claiming damages for PTSD sustained as a result of the Voyager collision. The proceedings were heard before a judge and jury in September 2002. After a lengthy trial, the jury was not satisfied that he was suffering from PTSD. Judgment was entered against him and he was ordered to pay the Commonwealth's legal costs. This caused him distress and he was admitted to hospital in November 2002 for a few weeks. In 2007, bankruptcy proceedings were issued for the recovery of the costs, causing him further distress.

The evidence before the Tribunal included extensive historical medical records and medical opinions, evidence from Mr Kermode as to the events at the time of the collision and their effect on him, evidence from his wife as to his behaviour, and evidence from his treating psychiatrist who had seen him on many occasions since 1997, as well as from other consultant psychiatrists called by both parties. The Tribunal decided that it was satisfied Mr Kermode was suffering from PTSD and claustrophobia as a result of the Voyager collision and that the Commission's acceptance of liability in 1997 should not have been revoked. The Tribunal also decided that the Commission remained liable for compensation from and after January 2007.

The Tribunal found that Mr Kermode's condition became worse as a result of the rejection of the common law proceedings, the resulting order for costs and the steps taken to enforce the costs order. The Tribunal was satisfied these were independent intervening events and that the Commission was not liable for the expenses of hospitalisation or increased medical expenses that arose from those matters. The Tribunal also found that the Commission was not liable for alcohol dependence or alcohol abuse, as Mr Kermode had ceased suffering from those conditions approximately 10 years earlier when he was diagnosed with diabetes, and then substantially modified his drinking habits.

As the Commission had rejected Mr Kermode's claim for permanent impairment, it did not consider the level of impairment. The Tribunal decided that it had jurisdiction to determine that claim, and proceeded to assess the degree of permanent impairment and non-economic loss.

The Tribunal set aside the decision under review and remitted the matter for reconsideration in accordance with its reasons for decision.

SOCIAL SECURITY

TYNAN AND SECRETARY, DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS

[2012] AATA 339; 6 June 2012

Senior Member JF Toohey

Whether a husband was disqualified from receiving a carer allowance because his wife was a resident in a nursing home

In 2006, Mr Tynan's wife suffered a severe stroke and was admitted to a nursing home. From early 2010, he has picked her up from the nursing home in the morning and cared for her in the family home for six to seven hours per day, returning her to the nursing home in the evening. Mr Tynan applied for a carer allowance under section 954A of the *Social Security Act 1991*, a supplementary payment available to a person who provides daily care in a private home for someone with special needs. Mr Tynan's claim was rejected.

At issue before the Tribunal was whether the care and attention Mrs Tynan was receiving met the requirements specified in the Act and, in particular, whether Mr Tynan was disqualified from receiving carer allowance because his wife was receiving paid care in a nursing home.

The Tribunal found that the care and attention provided by Mr Tynan addressed the special care needs of Mrs Tynan and that it was provided by Mr Tynan daily for a total of at least 20 hours per week.

The Department argued that, because Mrs Tynan received care and attention from nursing home staff, Mr Tynan could not satisfy the requirement in the Act that the care and attention must be received by the care receiver either:

- from the claimant alone, or
- together with another person whose work in providing the care and attention is not on wages at or above the relevant minimum wage.

The Tribunal held, however, that Mr Tynan satisfied the first element of this requirement and the second element did not operate as an exclusion. It serves only to preclude a person from relying on professional care to meet the minimum 20 hours per week. Nothing in the Act disqualifies a carer because the care receiver also receives paid care somewhere other than the private home.

The Tribunal was also satisfied that Mrs Tynan was receiving care and attention in a private home that was the residence of the claimant, but not the residence of both the claimant and the care receiver. The nursing home was Mrs Tynan's residence.

The Tribunal set aside the decision under review and found that Mr Tynan qualified for carer allowance.

TAXATION

GENERAL AVIATION MAINTENANCE PTY LTD AND COMMISSIONER OF TAXATION

[2012] AATA 120; 28 February 2012

Senior Member F O'Loughlin

Whether the applicant was liable to pay superannuation contributions for people who were engaged to make tandem parachute jumps with its clients

General Aviation Maintenance Pty Ltd provided services for people to make tandem parachute jumps, either with or without video recordings of the descent. General Aviation Maintenance's customers were harnessed to tandem masters who were paid by General Aviation Maintenance to pack parachutes, operate the parachute equipment during tandem jumps and make video recordings of the descents. General Aviation Maintenance did not make superannuation contributions for tandem masters and one of the masters lodged a complaint.

The issue before the Tribunal was whether the tandem master was an 'employee' or deemed employee of General Aviation Maintenance such that General Aviation Maintenance was liable to pay the superannuation guarantee charge.

The Tribunal considered General Aviation Maintenance's business operations and the role of the tandem master. The Tribunal found that there was no written employment contract between the tandem master and General Aviation Maintenance. However, such a contract had existed between the previous owner of the business and the tandem master. The Tribunal found that General Aviation Maintenance had regarded itself as a party to a contract with the tandem master as the tandem master continued to provide his services after the change in ownership. The Tribunal also found that the tandem master's services were an integral part of the business of General Aviation Maintenance. It noted that the tandem master's image was used in General Aviation Maintenance's advertising and General Aviation Maintenance exercised control over the way the tandem master undertook his duties. The Tribunal decided that regulation by a third party such as the Civil Aviation Safety Authority did not break the employment nexus if one was established. The Tribunal also decided that the use by the tandem master of his own equipment for non-core business activities did not displace the employment relationship.

The Tribunal concluded that the tandem master was an employee of General Aviation Maintenance, as the term is ordinarily understood, and that all amounts paid to him were salary or wages on which superannuation is calculated. The Tribunal also decided that General Aviation Maintenance paid the tandem master to perform or to participate in entertainment or a similar activity that involved physical or other personal skills, and to produce a film for customers. The Tribunal determined that this was payment for a service which enlivened the statutory definition of employee.

The Tribunal referred the matter back to the decision maker to recalculate the amount owing based on a revised figure for the tandem master's total earnings.

VETERANS' AFFAIRS

RE SKIPWORTH AND REPATRIATION COMMISSION

[2012] AATA 306; 21 May 2012

Senior Member K Bean

Whether the applicant was entitled to pension at the special rate – Whether osteoarthritis of both knees alone was responsible for incapacity to work and loss of earnings

Mr Skipworth suffered osteoarthritis of both knees as a result of his operational service in the Australian Army between 1970 and 1972. On discharge from the Army, he worked as a lift mechanic which involved climbing and kneeling. He sought medical advice in 2010 after experiencing pain in his knees at work and was advised to undergo bilateral knee replacement surgery. Mr Skipworth resigned from work because he assumed, although he was not so advised by medical practitioners, that he could not continue to work after the surgery. It became apparent after the surgery that he could no longer carry out his duties as a lift mechanic. He received a pension at 100 per cent of the general rate and sought a pension at the special rate.

There was no dispute that Mr Skipworth's condition of osteoarthritis was war-caused, nor that the injury led to his incapacity for work. The issue was whether, by reason of incapacity from that injury alone, Mr Skipworth was prevented from continuing to undertake remunerative work and thereby suffered a loss of salary or wages that he would not have suffered if he was free of that incapacity.

The Repatriation Commission submitted that, by resigning, Mr Skipworth could not satisfy the 'alone' test as his decision was an independent cause of ceasing remunerative work, separate to the incapacity from his injury.

The Tribunal decided that, as a matter of logic, Mr Skipworth's decision to retire did not have a real causal effect on the ultimate outcome of Mr Skipworth not being able to continue in employment. Mr Skipworth's inability to return to work would have eventuated whether he resigned or not and to find otherwise would be somewhat artificial and at odds with reality in the particular facts and circumstances of this case.

The Tribunal set aside the reviewable decision and decided that Mr Skipworth was entitled to a pension at the special rate.