APPENDIX 7: DECISIONS OF INTEREST

BROADCASTING

TODAY FM SYDNEY PTY LTD AND AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

[2012] AATA 544; 22 August 2012

Justice AC Bennett; Senior Member AK Britton

Whether an additional licence condition should be imposed on the applicant's radio broadcasting licence and, if so, in what terms

Mr Kyle Sandilands is a co-host of the live-to-air radio program 'The Kyle and Jackie O Show' on Today FM in Sydney. In late 2011, he co-hosted a television program which received an unfavourable review from a journalist. On 22 November 2011, Mr Sandilands made some remarks on-air against the journalist. Both Today FM and Mr Sandilands later apologised for any offence caused by the comments.

Following receipt of a complaint and an investigation, the Australian Communications and Media Authority (the Authority) found that Today FM had breached clause 1.3(a) of the *Commercial Radio Australia Codes of Practice and Guidelines 2011* (the Code) which requires that program content must not offend 'generally accepted standards of decency'. The Authority imposed a condition on Today FM's broadcasting licence under the *Broadcasting Services Act 1992* requiring that, for a period of five years, Today FM must comply with clause 1.3(a) of the Code, develop and implement a training program in relation to clause 1.3(a) and provide the Authority with evidence of its delivery. Today FM applied to the Tribunal for review of the decision.

Today FM argued that the requirement to comply with clause 1.3(a) should not be imposed because that clause lacks certainty, resting on indefinite phrases such as 'generally accepted standards of decency' and 'unjustified language'. It also contended that, given the seriousness of the penalties that arise from a breach of a condition and the voluntary steps it had taken to address the Authority's concerns, this part of the condition was a disproportionate response to the breach. More generally, Today FM argued that the condition should not apply to all its program content and that its period of operation should be reduced from five years to two.

The Tribunal found that cl 1.3(a) of the Code is amenable to being made a condition of a radio broadcasting licence. It found that, while concepts of 'offence', 'decency' and 'indecency' are not amenable to empirical measurement and may change over time, it does not follow that they are inherently uncertain. It also found that imposing a requirement to comply with the Code was an appropriate, measured and proportionate regulatory response, given the character of Today FM's breach and other instances of non-compliance, including an earlier incident involving Mr Sandilands.

The Tribunal noted that the history of Today FM's breaches of the decency provisions of the Code related to two particular programs. It reached the view that the condition should attach to the offending programs rather than to all Today FM programs but it should be in place for the full period of five years.

The Tribunal imposed a modified condition requiring Today FM to comply with clauses 1.3(a) and 1.3(b) of the Code in relation to the programs involved in earlier breaches of the Code and any live-to-air program hosted by Mr Sandilands. In addition, it ordered that Today FM employ two content monitors for the 'The Kyle and Jackie O Show' program and maintain a broadcast delay of 30 seconds. The condition required training on compliance with the Code at least once every six months for all employees and contractors involved in the production and presentation of programs produced by Today FM and the presentation of a report to the Authority within 14 days of each training cycle.

FOOD STANDARDS

AXIOME PTY LTD ON BEHALF OF COGNIS GMBH AND FOOD STANDARDS AUSTRALIA NEW ZEALAND

[2012] AATA 551; 24 August 2012

Deputy President RP Handley; Emeritus Professor GAR Johnston, Member

Whether the Australia New Zealand Food Standards Code should be amended to include Tonalin CLA as a 'novel food'

In 2008, Axiome Pty Ltd applied under the *Food Standards Australia New Zealand Act 1991* to have Tonalin CLA approved as a novel food under the Australia New Zealand Food Standards Code. The sale of novel foods is prohibited if they are not listed in the Code. The application stated that the purpose of Tonalin CLA, a chemically defined mixture of conjugated linoleic acid triglycerides, is as a useful adjunct in weight control programs and diets. Examples of its potential application in food included milk products, soy beverages, fruit based beverages, yoghurt and yoghurt products, nutrition bars and table spreads.

A novel food is defined in the Code to be a non-traditional food that requires an assessment of public health and safety considerations. A non-traditional food is defined as a food, a substance derived from food, or any other substance that does not have a history of human consumption in Australia or New Zealand.

The application was rejected by Food Standards Australia New Zealand (FSANZ). Its reasons for the decision included that the overall evidence base was not sufficient to demonstrate the safety of Tonalin CLA at the recommended daily intake. In making the decision, FSANZ had regard to the findings of an Epidemiology Scientific Advisory Group it had organised to provide an expert assessment of CLA.

The Tribunal was provided with evidence concerning the regulation of the consumption of CLA in the European Union, the United States of America, New Zealand and other countries. This included that CLA may be sold as a dietary supplement in capsule form in New Zealand. Evidence was given at the hearing by five expert witnesses with qualifications in biochemistry or medicine on a range of matters, including about studies on the effects of CLA and assessments of its safety.

The Tribunal considered first whether Tonalin CLA was a novel food as defined in the Code. It agreed with FSANZ that it was a non-traditional food. There was insufficient evidence to establish that Tonalin CLA has a history of human consumption in Australia or New Zealand either as a food, a substance derived from a food, or other substance. It seemed likely that a significant proportion of any consumption in New Zealand was in capsule form. Such capsules were represented as being for 'therapeutic use' and thereby excluded from consideration as 'food' under the Act. The weight of the evidence also satisfied the Tribunal that Tonalin CLA required further assessment of the public health and safety considerations, having regard to the potential for adverse effects in humans. Given these findings, the Tribunal concluded that Tonalin CLA was a novel food.

The Tribunal then considered whether FSANZ's decision not to vary the Code was the correct or preferable decision on the basis of the evidence. Having regard to the protection of public health and safety, the Tribunal was not satisfied from the best available scientific evidence before it that Tonalin CLA was safe for human consumption as an additive to food.

The decision under review was affirmed.

FREEDOM OF INFORMATION

AUSTRALIAN BROADCASTING CORPORATION AND HERALD AND WEEKLY TIMES PTY LIMITED

AUSTRALIAN BROADCASTING CORPORATION AND TENNANT

[2012] AATA 914; 21 December 2012

Justice DJC Kerr, President; Senior Member AK Britton

Whether certain documents were covered by the exemption in the Freedom of Information Act 1982 relating to the ABC's 'program material'

The Herald and Weekly Times Pty Ltd and Mr Tennant made unrelated requests to the Australian Broadcasting Corporation (ABC) for access to documents under the Freedom of Information Act. The Herald and Weekly Times requested documents relating to salaries and other payments made

to program makers engaged on 13 ABC television and radio programs. Mr Tennant requested policies and other documents relating to the classification of television programs broadcast on the ABC.

Section 7(2) and Part II of Schedule 2 of the Act work together to provide that the ABC is exempt from the operation of the Act in respect of documents in relation to its program material. The ABC refused both requests on the basis that the documents constituted 'program material' or 'documents in relation to program material'.

Both the Herald and Weekly Times and Mr Tennant applied to the Office of the Australian Information Commissioner for review of the decisions. The Freedom of Information Commissioner set aside both decisions, finding that the connection between the documents sought and the ABC's program material was so remote there was not even an indirect relationship between them. The ABC applied to the Tribunal for review of each decision.

The Tribunal considered the scope and meaning of the exemption for program material. As to scope, the Tribunal held that the exemption applies only in relation to documents which are 'program material' and not for any wider class of documents with some extended relationship or connection to those documents: that is, documents 'in relation to program material'. The words 'program material' do extend beyond the program itself. 'Program material' was held to mean a document that is a program, all versions of the whole or any part of the program, any transmission or publication of the program, a document of any content or form embodied in the program as well as any document acquired or created for the purpose of creating the program, whether or not incorporated into the completed program. It may also include documents created after broadcast.

The Tribunal found that the documents requested by Herald and Weekly Times were not 'program material'. It also found that, even if its conclusion on the scope of the exemption were incorrect, they were not documents 'in relation to program material'. The connection between the class of documents requested and 'program material' was both remote and tenuous. In relation to the documents requested by Mr Tennant, the Tribunal found that, while the classification symbol displayed on an ABC program constituted exempt 'program material', the other documents falling within the scope of Mr Tennant's request were neither 'program material' nor documents 'in relation to program material'.

The Tribunal affirmed the Freedom of Information Commissioner's decisions, except in relation to the classification symbol incorporated in any ABC program.

HEALTH PROFESSIONALS

ALEKOZOGLOU AND MEDICARE PARTICIPATION REVIEW COMMITTEE

[2012] AATA 937; 21 December 2012

Deputy President JW Constance; Dr R Blakley, Member

Whether a medical practitioner should be disqualified from providing Medicare services following repeated instances of inappropriate practice

Dr Alekozoglou is a general practitioner who has conducted a bulk-billing practice in Melbourne for many years. On three occasions between 1997 and 2011, his practice was reviewed under the Professional Services Review Scheme, part of the Medicare Scheme established by the *Health Insurance Act 1973*. Following each review, it was determined that Dr Alekozoglou had engaged in inappropriate practice as defined in the Act. Various actions were taken as a result. In 2011, Dr Alekozoglou agreed that he should be reprimanded, repay a certain proportion of the Medicare benefits he had received, be disqualified from providing a particular Medicare service for 12 months and be fully disqualified from receiving payment for Medicare services for a period of one month.

In accordance with the requirements of the Act, a Medicare Participation Review Committee was established following the review in 2011. The Committee determined that Dr Alekozoglou should be fully disqualified from providing services under the Act for a further period of three months. Dr Alekozoglou applied to the Tribunal for review of this decision.

The Tribunal considered a number of factors in determining what the preferable decision should be in this case. These included the repeated instances of inappropriate practice by Dr Alekozoglou, his failure to address his lack of understanding of requirements of the Medicare Benefits Schedule, his attitude to claiming payment for services not properly provided and his continued provision of a high volume of services to a large number of patients with the risk that he will not provide proper care of those patients. The Tribunal also took into account the need to protect public funds from claims for inappropriate practices and the potential dislocation of Dr Alekozoglou's practice and consequent effect on his patients that would flow from a full disqualification.

The Tribunal concluded that any difficulties which may arise from Dr Alekozoglou being fully disqualified for a period were far outweighed by the various considerations in favour of such action. The Tribunal decided that, in view of Dr Alekozoglou's history of repeated inappropriate practice over a long period and his reluctance to take meaningful steps to remedy the situation, a significant period of full disqualification in addition to the period of disqualification already served by Dr Alekozoglou was appropriate. The Tribunal varied the decision under review but only as to the time at which the disqualification period of three months was to commence.

SOCIAL SECURITY

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

[2013] AATA 51; 1 February 2013

Dr KS Levy, Senior Member

Whether the applicant was an Australian resident for the purpose of qualifying for the disability support pension

Mr Dyer commenced receiving disability support pension (DSP) in 1998. Since April 1999, he has spent considerable amounts of time living in the Philippines. From February 2005, he usually remained in the Philippines for three months and then returned to Australia for one to three weeks at a time. He would return to Australia approximately every 13 weeks in order to continue to be eligible to be paid DSP. If he was absent from Australia for more than 13 weeks – the maximum portability period – DSP was no longer payable.

On 1 July 2011, the eligibility requirements for DSP set out in the *Social Security Act 1991* were amended to include an ongoing requirement that a person must be an Australian resident. This is subject to certain exceptions that were not relevant in this case. In March 2012, Mr Dyer's DSP was cancelled on the basis that he was no longer considered to be an Australian resident.

The first issue for the Tribunal was whether Mr Dyer was an 'Australian resident' as defined in section 7 of the Act. The Tribunal considered the factors outlined in section 7(3) of the Act to which regard must had when deciding whether a person is residing in Australia, including the accommodation used by Mr Dyer in Australia, his family relationships, his employment, business and financial ties with Australia, the nature and extent of any assets in Australia and the frequency and duration of his travel outside Australia. The Tribunal concluded that Mr Dyer was not an Australian resident at the date of cancellation of DSP.

The second issue for the Tribunal was whether various amendments to the portability rules for DSP since 2000 applied to Mr Dyer. Mr Dyer considered he should be able to have DSP paid to him indefinitely while living overseas under rules which previously existed.

The Tribunal reviewed the amendments made to the portability provisions in 2000 and 2004 and the saving provisions which were enacted at the time. It noted that Centrelink records suggested Mr Dyer was not affected by the amendments in 2000. However, the Tribunal found that, whatever flexibility was available to Mr Dyer at an earlier time, it had subsequently expired. The 2004 amendments elicited an intention that the saving provisions available to a person in Mr Dyer's position living outside Australia would be overridden if he re-entered Australia. As Mr Dyer had re-entered Australia after the 2004 amendments commenced, the Tribunal concluded that he could not rely on the earlier saving provision. He was subject to the current statutory provisions.

The Tribunal affirmed the decision under review.

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

[2012] AATA 924; 24 December 2012

Professor T Sourdin, Member

Whether the applicant was an Australian resident for the purpose of qualifying for the disability support pension

The applicant originally qualified for DSP in 1984. He suffers from schizophrenia and other health problems and could be described as being homeless. For more than a decade, he has travelled to various countries in South-East Asia, spending a considerable time out of Australia. In March 2012, the applicant was found not to meet the residence requirements in the *Social Security Act 1991* and his DSP was cancelled.

The evidence before the Tribunal was that the applicant has lived in a variety of places in Australia, mostly outdoors, where he constructs a shelter. While he does not stay in places for lengthy periods, he most closely identifies with Darwin as his 'home' base where he has rights to camp on Aboriginal land. He aspired to own a caravan in Australia which would allow him to continue to move around and offered security and protection from the climate. The applicant said that he travels to Asia to obtain some respite from being homeless. This travel and the availability of cheap food and lodging meant that his mental and physical health could be maintained.

The Tribunal had regard to the criteria set out in section 7(3) of the Act which must be considered when deciding whether a person is an Australian resident. In relation to the nature of the accommodation used by the applicant in Australia, the Tribunal agreed with the applicant that it was also relevant to consider whether ties or connections exist to other countries or places outside Australia. The applicant has no ties to any other country, does not stay in any particular South-East Asian country or place, and does not have settled or permanent accommodation outside Australia. While he may not have permanent accommodation and does not live in a house, the applicant was found to have 'settled' accommodation in Australia.

In relation to the other factors, the Tribunal noted the applicant has some family relationships and these are continuing and that he has no family ties or connections overseas. Given his situation, minimal weight could be given to the nature and extent of his employment, business or financial ties with Australia and the nature and extent of his assets located in Australia. The applicant's pattern of travel suggested he could be considered as not meeting the resident requirements but it was agreed he was not a resident of any country outside Australia. The applicant's evidence was that he intended to remain in Australia.

The Tribunal noted that the factors were finely weighted but, on balance, were in the applicant's favour. It concluded that the applicant has ties to Australia and no ties to another country that would outweigh these ties. The Tribunal set aside the decision under review.

TAXATION

WALSH AND COMMISSIONER OF TAXATION
WILSON AND COMMISSIONER OF TAXATION
BRIDGE AND COMMISSIONER OF TAXATION

[2012] AATA 451; [2012] AATA 452; [2012] AATA 453; 18 July 2012

YOUNG AND COMMISSIONER OF TAXATION
LYON AND COMMISSIONER OF TAXATION

[2013] AATA 347; 28 May 2013

Deputy President DG Jarvis

Whether the Commonwealth superannuation surcharge legislation validly applied to the applicants

The applicants held senior positions within the South Australian and Western Australian public services. Each applicant was a member of either the South Australian Superannuation Fund established pursuant to the *Superannuation Act 1988* (SA) or the Gold State Super Scheme administered by the Western Australian Government Employees Superannuation Board. The Commissioner of Taxation determined that the applicants were liable to pay superannuation contribution surcharge in relation to various tax years under the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997.*

In 2009, the High Court of Australia held in *Clarke v Commissioner of Taxation* (2009) 240 CLR 272 that the provisions of the legislation that imposed a surcharge on superannuation contributions could not validly apply to a member of the Parliament of South Australia in respect of his membership of a constitutionally protected superannuation fund. The Court referred to the implied constitutional limitation that a law of the Commonwealth that substantially interferes with the rights of a State to determine the terms and conditions on which the State engages persons at the 'higher levels of government' constitutes an impermissible interference with the capacity of the State to perform its constitutional functions.

The applicants objected to assessments raised against them on the basis that the legislation could not validly apply to them as they had held positions at the 'higher levels of government'. The Commissioner of Taxation disallowed their objections in full or in part and the applicants applied to the Tribunal for review of the decisions.

In the first set of cases relating to Mr Walsh, Mr Wilson and Mr Bridge, a preliminary issue arose as to whether the Tribunal had jurisdiction to determine a question involving the constitutional validity of the legislation. The Tribunal concluded that, while it did not have jurisdiction to reach a conclusion having legal effect that legislation is unconstitutional, it could form an opinion on whether legislation can apply within constitutional limits to particular persons in particular circumstances and it could act on that opinion in determining applications for review of administrative decisions.

The Tribunal then considered whether the applicants were persons engaged at the 'higher levels of government'. It took the view that this does not depend simply on the position of the person in the hierarchy of government. The Tribunal needed to assess the roles and functions of each position and evaluate the degree to which the exercise of, or capacity for the exercise of, the constitutional powers and functions of the State would be impaired, curtailed or weakened by the application of the legislation to the applicant.

The applicants held various positions within the South Australian government over the relevant period. The Commissioner of Taxation had accepted that the legislation could not be applied to periods when a person was a chief executive officer of a government department or agency and conceded during the review that the legislation did not apply to Mr Walsh when he was the Executive Director, Cabinet Office in the Department of the Premier and Cabinet nor to Mr Bridge when he was Director of the Office of Year 2000 Compliance. In respect of the remaining disputed positions, the Tribunal was not satisfied that the implied limitation applied. The effect of the legislation on the applicants in those positions did not significantly burden, curtail or weaken the capacity of the State to carry out its constitutional functions.

In relation to Mr Young and Mr Lyon, the principal issue was whether the implied constitutional limitation applied to them in their position as Deputy State Solicitors of Western Australia. The Tribunal accepted that the Commissioner of Taxation had correctly conceded that the legislation could not validly apply to one of the applicants during periods when he had been acting in the position of State Solicitor of Western Australia.

The Tribunal examined in detail the relationship between Mr Young and Mr Lyon and those to whom they were providing advice, as well as the significance of that advice, and found that the applicants were part of a small group of senior executive officers within the State Solicitor's Office who shared the responsibility for fulfilling the key function of assisting the Attorney-General and providing legal advice to the Government of Western Australia. The Tribunal also noted that the applicants did not operate under a strict public service type administrative structure with a clear internal hierarchy and that requests for them to advise and their resulting advice occurred without the involvement of the State Solicitor. In addition, their salaries were determined by an independent tribunal, as was the case with other persons such as judicial officers, parliamentarians, persons holding statutory offices and departmental heads. The Tribunal concluded that the legislation could not validly apply to the applicants.

THERAPEUTIC GOODS

ASPEN PHARMACARE AUSTRALIA PTY LTD AND MINISTER FOR HEALTH AND AGEING

[2012] AATA 362; 15 June 2012
[2012] AATA 376; 20 June 2012
[2013] AATA 197; 5 April 2013

Justice DJC Kerr, President; Dr T Nicoletti, Senior Member

Whether the registration of certain pain medications containing dextropropoxyphene should be cancelled

Products containing dextropropoxyphene (DPP) have been available for therapeutic use in Australia since at least 1970. Aspen Pharmacare Australia Pty Ltd markets two products containing DPP - Di-Gesic and Doloxene - which are used therapeutically for the relief of mild to moderate pain.

A prescription medicine cannot be sold in Australia unless it is registered in the Australian Register of Therapeutic Goods. Section 30(2)(a) of the *Therapeutic Goods Act 1989* provides that the Secretary of the Department of Health and Ageing may cancel the registration of goods if 'it appears to the Secretary that the quality, safety or efficacy of the goods is unacceptable'. In November 2011, a delegate of the Secretary gave notice of a proposal to cancel the registration of products containing DPP. On reconsideration, a delegate of the Minister affirmed the cancellation decision.

The applicant applied to the Tribunal for review of the decision and requested that the decision be stayed. Justice Downes, then President, granted a stay subject to various undertakings to allow the applicant to continue supplying Di-Gesic and Doloxene until further order.

The Tribunal then conducted a substantive hearing and published a decision setting out its views on a range of matters. It concluded that there was no evidence to suggest that the quality of either of the goods was unacceptable. In respect of efficacy and safety, the Tribunal held that a decision-maker who must form a view as to whether the safety of a particular therapeutic good is so far from the required standard as to be unacceptable must balance the efficacy of the goods against the risks of the harm or injury to which their use or misuse may give rise.

The Tribunal accepted that there was a relatively small difference between a therapeutic dose of DPP and the amount sufficient to create a risk of serious adverse harm or even the risk of fatality. For that reason, if there would always be one or more suitable efficacious alternative pain relief medicines for mild-to-moderate pain with no such risk of accidental overdose, the balance would tip in favour of deregistration. However, the Tribunal found that DPP is the only weak opioid available for a small number of patients who are unable to metabolise either codeine or tramadol. There is a small but not insignificant group of patients for whom there is no available weak opioid or suitable analgesic alternative to DPP for mild to moderate pain.

The Tribunal remitted the matter to the Minister for reconsideration under section 42D of the Administrative Appeals Tribunal Act to enable consideration to be given to whether additional conditions to ensure acceptable safety could be imposed under section 28 of the Therapeutic Goods Act which would permit Di-Gesic and Doloxene to remain available to those for whom it remained appropriate. In September 2012, the Minister affirmed the original decision and the proceedings resumed pursuant to section 42D(8) of the Administrative Appeals Tribunal Act.

Following a further hearing in February 2013, the Tribunal determined that, subject to the imposition of appropriate conditions pursuant to section 28 of the Therapeutic Goods Act, the quality, safety and efficacy of Di-Gesic and Doloxene is not unacceptable and the products should remain on the Register. The Tribunal identified the types of conditions required, including continuation of significant safety warnings in the product information and consumer medical information, periodic safety reminders to doctors and pharmacists, and conditions providing a high level of assurance that doctors will prescribe the products appropriately.

HEALTH WORLD LIMITED AND MINISTER FOR HEALTH AND AGEING

[2013] AATA 388; 7 June 2013

Deputy President PE Hack SC; Senior Member RG Kenny; Dr GJ Maynard, Member

Whether an advertisement for a therapeutic good breached the legislative scheme

Health World Limited is the supplier of a tablet called Urinary Tract Support (UTS) which falls within the definition of 'therapeutic good' in the *Therapeutic Goods Act 1989*. In 2010, a complaint was made to the Therapeutic Goods Administration about Health World's advertising of UTS on three websites. The advertisement included statements to the effect that UTS may relieve symptoms of urinary tract infections, such as cystitis, and promote urinary tract health.

The Complaints Resolution Panel determined that Health World's advertising of UTS breached the Act and the *Therapeutic Goods Advertising Code 2007* (the Code). Health World was subsequently ordered to withdraw the advertisement found on its website, to withdraw and not use certain representations about UTS, and to arrange for the publication of a retraction. Health World sought review of that decision.

The Tribunal noted that, before the reviewable decision was made, Health World had amended the standard indications and product specific indications of UTS on the Australian Register of Therapeutic Goods. Health World's website advertisement was amended to reflect the altered indications shown in the Register which related to the traditional Chinese medicinal use of the ingredients of UTS.

The Tribunal considered first whether the original advertisement breached the Act or various elements of the Code.

Section 42DL(1)(c) of the Act prohibits the publication or broadcast of an advertisement that contains a representation about serious forms of certain diseases, conditions, ailments or defects, including urogenital diseases and conditions, unless prior approval has been obtained for such a reference. On the medical evidence, the Tribunal was satisfied that cystitis is a urogenital disease but was not satisfied that it is a serious form of urogenital disease or condition. As such, the advertisement did not breach section 42DL(1)(c) of the Act nor paragraph 5(2) of the Code which is in similar terms.

Paragraph 4(1)(b) of the Code requires an advertisement for therapeutic goods to contain correct and balanced statements only and claims which the sponsor has already verified. The Tribunal found that the advertisement did breach this part of the Code because it did not contain a reference to the traditional Chinese medicine use of UTS. While the claims made in the advertisement were supported by Chinese medicine, the claims had not been verified for the purpose of paragraph 4(1)(b) of the Code as the advertisement did not explicitly assert reliance on traditional Chinese medicine use.

Paragraphs 4(2)(a), (b) and (c) of the Code specify that an advertisement must not be likely to arouse unwarranted and unrealistic expectations of product effectiveness, be likely to lead to consumers self-diagnosing or inappropriately treating potentially serious diseases, or mislead or be likely to mislead. The Tribunal was not satisfied on the evidence that the advertisement breached any of these requirements. The Tribunal did not consider that a reasonable reader would be misled or be likely to be misled because the claims made in the advertisement had not been verified by the standards of Western scientific medicine.

The Tribunal noted that a conclusion that the Code had been breached would usually warrant an order for the withdrawal of the advertisement. However, the Tribunal found this was not necessary in the circumstances as Health World had already withdrawn the advertisement. The Tribunal did not consider a retraction was necessary in the circumstances.

The Tribunal set aside the decision under review and substituted a decision that the initial decision be revoked.

VOCATIONAL EDUCATION AND TRAINING REGULATION

IVY EDUCATION GROUP PTY LTD AND AUSTRALIAN SKILLS QUALITY AUTHORITY

[2013] AATA 138; 14 March 2013

Deputy President RP Handley

Whether the applicant's registration as a registered training organisation should be cancelled

Ivy Business College was first registered as a registered training organisation (RTO) in June 2009 by the New South Wales Vocational Education and Training Accreditation Board. The Board conducted audits in 2010 and 2011 and found the college to be non-compliant with the

National Vocational Education and Training (VET) Quality Framework, resulting in the imposition of a condition on the college's registration. On 1 July 2011, the Australian Skills Quality Authority became the regulator under the *National Vocational Education and Training Regulator Act 2011.*

In September 2011, the college was purchased by Ivy Education Group Pty Ltd. Following an application to the Authority to add further qualifications to the scope of its registration, the college was audited in February 2012. The Authority found the college non-compliant with the Standards for NVR Registered Training Organisations (the Standards). The Authority notified the college that it intended to cancel the college's registration as an RTO and to refuse the application to add further qualifications to its scope. The college submitted evidence of its rectification of the identified areas of non-compliance but the Authority decided to cancel the college's registration as an RTO. The applicant applied to the Tribunal for review of the decision.

The Authority submitted that the point in time at which compliance with the provisions of the Standards should be considered is the date of cancellation of registration and not the date of the Tribunal hearing. The Tribunal found that the Act allowed for a series of interactions leading up to a decision to cancel registration, including audits, submissions from the RTO and notice of intention to impose sanctions, and allowed RTOs to address non-compliance issues raised. The Act focuses on issues rather than the particular timing of a decision. The Tribunal held that there is no temporal element in the Act necessitating deviation from the general approach that the Tribunal is to take into account all the relevant information available to it at the time of making a decision.

On all the evidence before it, the Tribunal was satisfied that the college was non-compliant with a significant number of the Standards and that the extent of the non-compliance was significant. The Tribunal expressed concern about the governance of the college and was not confident the issues of non-compliance could be easily fixed. There had been sufficient opportunities for this to have occurred. The Tribunal also considered the need to protect the interests of students at the college and the broader public interest in ensuring that vocational education and training colleges operate at the required standard and that Australia's reputation is maintained.

The Tribunal concluded that the appropriate sanction in the circumstances was that the college's registration as an RTO should be cancelled. The Tribunal affirmed the decision under review but ordered that the cancellation should take effect in 30 calendar days to give students the opportunity to apply to transfer their enrolments elsewhere.

WORKERS' COMPENSATION

AS-SAYEED AND COMCARE

[2013] AATA 210; 10 April 2013

Professor RM Creyke, Senior Member; Dr P Wilkins, Member

Whether the applicant's employment made a significant contribution to his back pain – Use of the concurrent evidence procedure to take evidence from expert witnesses

Mr As-Sayeed began working for the ACT Government in 2004. After experiencing back pain in 2005, a workstation assessment was conducted and he was provided with a new chair. This was replaced by another type of chair some years later after a rehabilitation assessment was undertaken when he had an ankle injury. In 2008, Mr As-Sayeed was promoted to Information Manager. This role had a significant workload, involved continuous desk work and resulted in him not always taking regular breaks.

In November 2010, Mr As-Sayeed reported suffering from back pain which he attributed to his chair and long periods spent at his workstation. While getting ready for work one day, Mr As-Sayeed coughed and immediately felt a dramatic pain in his back. He was taken by ambulance to hospital and did not return to work until some months after the incident. He later submitted a claim to Comcare for compensation for a 'displacement of intervertebral disc – lumbar' injury. Comcare rejected the claim and Mr As-Sayeed applied to the Tribunal for review.

There was evidence before the Tribunal from a number of medical experts, including two occupational physicians and the applicant's general practitioner. Prior to the hearing, it was agreed that evidence would be taken concurrently from these three experts. The concurrent evidence procedure involves two or more experts giving evidence at the same time. It provides a forum in which, in addition to providing their own evidence, experts can listen to, question and comment on the evidence of the other experts.

Specific questions to be asked of the medical witnesses were drafted by the parties and agreed to by the Tribunal. These related to the diagnosis of the condition, whether it was an injury or aggravation, its connection with Mr As-Sayeed's employment and its effect. The questions were provided to the experts prior to the hearing so they could formulate their answers. On the morning of the hearing, the experts were given 30 minutes to confer alone. Two of the experts appeared in person and one by telephone. The evidence given at the hearing revealed there was agreement amongst the experts on all questions other than whether Mr As-Sayeed's employment contributed to his condition. However, the majority view was that there was such a contribution.

The Tribunal found that Mr As-Sayeed suffered a pain condition associated with degenerative disease of the lumbar spine and that it was an aggravation of that disease. The Tribunal was satisfied that the symptoms had become more prominent in at least the month prior to the incident and this was due principally to conditions at work. On balance, the Tribunal found that his low back pain was significantly contributed to by his employment. The Tribunal set aside the decision under review.