Appendix 6: Decisions of interest

The following summaries of Tribunal decisions provide an idea of the types of issues raised in the Tribunal's major jurisdictions and highlight some of the more important or interesting decisions delivered during the reporting year.

ENVIRONMENT

Re The International Fund For Animal Welfare (Australia) Pty Ltd & Ors and Minister for Environment and Heritage & Ors
[2005] AATA 1210; 7 December 2005
[2006] AATA 94; 6 February 2006
Justice GK Downes, AM, QC; Senior Member G Ettinger; Dr I Alexander, Member

Whether eight Asian elephants should be imported into Australia — Whether any further conditions should be attached to the import permit

The operators of Melbourne Zoo and Taronga Zoo in Sydney applied to the Minister for the Environment and Heritage for permits to import eight Asian elephants from Thailand. The zoos also jointly applied to the Minister for approval of a Captive Management Plan as a cooperative conservation program.

The Minister approved the Plan and issued the permits subject to conditions under the *Environment Protection and Biodiversity Conservation Act 1999*. The International Fund for Animal Welfare (Australia) Pty Ltd, Humane Society International Inc and RSPCA Australia Inc applied to the Tribunal for review of the decisions to issue the permits.

The critical issues to be determined by the Tribunal were:

(i) whether the importation of the elephants will be detrimental to, or contribute to trade which is detrimental to, the survival or recovery in nature of Asian elephants;

(ii) whether the elephants were obtained in contravention of, or their importation would involve the contravention of, any law;

(iii) whether the elephants are being imported for the purposes of conservation breeding or propagation and not primarily for commercial purposes; and

(iv) whether the zoos are suitably equipped to manage, confine and care for the animals, including meeting their behavioural and biological needs.

The Tribunal received detailed evidence in relation to the proposed facilities at both zoos, including the size and features of the various enclosures and barns. The Tribunal and the parties' representatives visited both sites. Evidence was given by 17 expert witnesses. Witnesses whose evidence related to similar areas of knowledge gave evidence concurrently. A number of overseas witnesses participated by videoconference or telephone.

In relation to the potential impact of this importation on the survival or recovery in nature of Asian elephants, the evidence before the Tribunal was that there are approximately 4,600 elephants in Thailand: approximately 2,900 in captivity and approximately 1,700 in the wild. While accepting that there may be elephants in captivity that were born in the wild, the Tribunal was satisfied on the evidence that the elephants proposed for importation had most likely been born in captivity. The Tribunal noted that there was no evidence of any direct relationship between the capture and sale of wild elephants and the export of elephants from Thailand, nor of any immediate threat to the population of either wild or captive elephants in Thailand. The Tribunal was satisfied that the proposed importation would not be detrimental to, nor contribute to trade which is detrimental to, the survival or recovery in nature of Asian elephants.

As to the lawfulness of the importation, the Tribunal held that the importation would not contravene any relevant law. In particular, there would be no contravention of Australian law if the elephants are imported pursuant to a permit.

In relation to the purposes for which the elephants are being imported, the purpose relied on by the zoos was "conservation breeding or propagation". The Tribunal considered expert evidence relating to the breeding of elephants in captivity. While noting that difficulties may arise, the Tribunal was satisfied that the program proposed in the Captive Management Plan is a bona fide program that has the object of establishing a breeding population of Asian elephants in Australia. While the zoos also intend to exhibit the elephants, the existence of this further purpose, which alone would not be sufficient to allow for importation, does not invalidate the importation for a permissible purpose.

The Tribunal was also required to be satisfied that the importation is not primarily for commercial purposes. The Tribunal noted that the primary purposes of the zoos include research, education and breeding: their primary activities do not involve commercial purposes. The Tribunal accepted that part of the reasoning of the zoos in seeking to import the elephants is that they will be exhibited and are likely to increase the visitors to the zoos. However, the Tribunal was satisfied that the importation of the elephants is not primarily motivated by earning more income, but to educate and expose the public to environmental and conservation issues.

In relation to the welfare of the elephants, the Tribunal recognised that care and management will occur in circumstances of confinement. Meeting the biological and behavioural needs of the elephants does not require natural conditions but assumes captivity. The Tribunal was satisfied that, subject to further evidence to be given in relation to a number of aspects of the facilities available, the zoos are suitably equipped as required by the legislation to manage, confine and care for the elephants, including their behavioural and biological needs. While the space available for the elephants is not large, the Tribunal held that it is adequate to satisfy the legislative requirements, particularly when proposals for training and requiring the elephants to emulate certain tasks undertaken in the wild are taken into account. While it would be desirable for the elephants to be members of the same family, the Tribunal noted that this would not be feasible. Each of the elephants had been separated from its family for a long time. The proposal to group the elephants in each zoo under a matriarch was considered to be positive in terms of the welfare requirement.

The Tribunal sought further evidence from the zoos in relation to a range of aspects of the facilities for the elephants, including:

– the availability of mud wallows and sand or sandy loam banks for the elephants to use; and
– the state of the indoor flooring and the extent to which it would encourage the elephants to lie down.

Following the receipt of this further evidence, the Tribunal was satisfied that the zoos had adequately addressed the areas of concern. The Tribunal set aside the decisions of the Minister and substituted new decisions to issue replacement permits for the importation of the elephants with the conditions specified in the original permits, together with a number of additional conditions. These included requirements for further works on the enclosures and barns, undertaking trials of different bedding material, the installation of closed circuit television camera in the enclosures and barns and the provision of reports to the Department of the Environment and Heritage on actions taken.

Re Humane Society International and Minister for the Environment and Heritage
[2006] AATA 298; 3 April 2006
Deputy President H Olney, AM, QC; Senior Member J Kelly; Mr IR Way, Member

Whether fishing operations in the Southern Bluefin Tuna Fishery should be declared to be an approved wildlife trade operation

In November 2004, the Minister for the Environment and Heritage made a declaration approving fishing operations in the Southern Bluefin Tuna Fishery as an approved wildlife trade operation under the *Environment Protection and Biodiversity Conservation Act 1999*. The Minister also amended a list of exempt native specimens

to include fish taken in the fishery. The effect of making these instruments was that it is not an offence to export southern bluefish tuna that have been caught in the fishery while the declaration remains in force. The Humane Society International applied for review of the decision to make the declaration.

Southern bluefin tuna is a highly migratory fish. It can live up to 40 years and grows up to two metres in length. It is one of the most highly valued fish for sashimi, particularly in Japan, which is the main market for the fish. Southern bluefin tuna has been fished since the 1950s and, by the early 1980s, there were signs that the breed was dangerously overfished.

In 1989, Japan, Australia and New Zealand agreed to set informal catch limits, which led to substantial reductions in take. In 1994, Australia, Japan and New Zealand entered into the Convention for the Conservation of Southern Bluefin Tuna. A major function of the Commission, established under the Convention, is to decide upon a total allowable catch and its allocation among the member countries. The Commission also asks certain non-member countries to abide by specified catch limits.

The Australian Southern Bluefin Tuna Fishery is managed by the Australian Fisheries Management Authority (AFMA). AFMA is responsible for determining Australia's national catch allocations in a manner consistent with domestic and international legal obligations.

The legislation sets out that the Minister must not declare an operation to be an approved wildlife trade operation unless it is satisfied that:

- the operation is consistent with the objects of the part of the Act dealing with the international movement of wildlife specimens;
- the operation will not be detrimental to the survival of, or conservation status of, a taxon to which the operation relates; and
- the operation will not be likely to threaten any relevant ecosystem, including, but not limited to, any habitat or biodiversity.

The Minister must also have regard to the significance of the impact of the operation on an ecosystem and the effectiveness of the management arrangements for the operation, including monitoring procedures.

In considering whether to make a declaration, the Minister can take into account a range of relevant matters but is required to rely primarily on the outcomes of any assessment carried out under the Act in relation to the fishery. A relevant assessment of the Southern Bluefin Tuna Fishery was undertaken by AFMA. The following principles guided the assessment:

- that the fishery is conducted in a manner that does not lead to overfishing or, for those stocks that are over fished, the fishery must be conducted such that there is a high degree of probability that stocks will recover;
- fishing operations should be managed to minimise their impact on the structure, productivity, function and biological diversity of the ecosystem.

In relation to the first principle, AFMA concluded that there is a strong, verifiable framework to ensure that the fishery is conducted in a manner that Australia meets its national and international obligations. AFMA was also satisfied that there is a high chance of achieving the objective set out in the second principle.

Over the course of six hearing days, the Tribunal received a large amount of oral and documentary evidence. In particular, evidence was given by a number of experts and senior government officials relating to the impact of the fishing operations and the international context in which Australia manages the Southern Bluefin Tuna Fishery.

The Tribunal noted that this area of decision-making concerns a field of endeavour that is highly specialised and equally highly uncertain. The evidence and opinions of skilled scientists and others intimately involved in the particular field

is critical to the decision. The statutory requirement that the Minister, and the Tribunal on review, rely primarily on the outcomes of any assessment carried out under the Act reflects this.

The Tribunal concluded that its process had provided an opportunity to consider the outcomes expressed in the assessment undertaken by AFMA. The Tribunal held that it was appropriate to give effect to the legislative intention that the Tribunal rely primarily on that assessment in reviewing the Minister's decision. The Tribunal held that it was satisfied as to each of the statutory preconditions to making the declaration and affirmed the Minister's decision.

IMMIGRATION

Re Priori and Minister for Immigration and Multicultural and Indigenous Affairs
[2005] AATA 1288; 22 December 2005
Member S Webb

Whether the visa applicant passes the character test — Whether the visa should be refused on the basis that he fails the character test

The visa applicant, an Albanian, was born in Kosovo in 1983. In 1999, he and his brother fled Serbia at the urging of their parents to escape persecution at the hands of the Serbian military. The brothers travelled first to Belgium where the visa applicant was issued with two certificates by Belgian authorities, both in false names. The brothers entered Australia in November 1999 using bogus documents. They were assisted by a man known only as 'Arif'.

The visa applicant, using his real name, lodged an application for a protection visa, which was refused on 22 November 2000. The Refugee Review Tribunal affirmed the decision in 2001 on the basis that the situation in Kosovo had undergone radical changes for the better. An application for judicial review and a request to the Minister to exercise her residual discretion were unsuccessful. The visa applicant departed Australia in March 2004.

In May 2002, the visa applicant had met Ms Priori. They began living together in March 2003 and were engaged to be married. On his return to Europe, the visa applicant applied for a prospective marriage visa. In May 2004, he was advised that the application had been refused on character grounds pursuant to section 501 of the *Migration Act 1958*. Mr Priori applied to the Tribunal for review of the decision.

The Tribunal considered whether the visa applicant failed to pass the character test on either of the following grounds:

- the visa applicant had an association with 'Arif', a man whom the Minister reasonably suspected was involved in criminal conduct; and
- the visa applicant was not of good character because of his general conduct in that he used a false passport, entered Australia with the assistance of a people smuggler, obtained permission to remain in Belgium on the basis of a false identity and engaged in work contrary to the conditions of his bridging visa.

The Tribunal noted that, only if it found that the visa applicant did not pass the character test, would it be necessary to consider whether the discretion not to refuse the visa should be exercised in his favour.

The Tribunal found that 'Arif' was a person reasonably suspected of involvement in criminal conduct. The Tribunal accepted the evidence of the visa applicant that it was his older brother who dealt directly with 'Arif', that he had no knowledge that the destination of choice was to be Australia and that he knew nothing of international laws, having the benefit of only limited education. The Tribunal noted that the visa applicant was just 15 years of age at the time. The Tribunal described the relationship between the visa applicant and 'Arif' as a 'tenuous, indirect and exploitative relationship for profit between a child victim and an adult perpetrator'. Further, the degree, frequency, duration and nature of the visa applicant's involvement with 'Arif' satisfied the Tribunal that the association was not one contemplated by the Act.

In relation to the visa applicant's past and present general conduct, the Tribunal found that the visa applicant's age and dire circumstances led him to follow the advice he had been given by adults to provide false identity details to the Belgian authorities. The Tribunal was not satisfied that this conduct pointed to any deficiency of good character. In relation to the issue of whether the visa applicant worked in breach of the bridging visa requirements, the Tribunal was not persuaded on the evidence before the Tribunal that this had occurred. The Tribunal was satisfied, however, that the visa applicant had engaged in 'bad conduct' by obtaining and entering Australia using bogus documents, providing false information to immigration officials on arrival in Australia and seeking to conceal his use of a false identity in Belgium.

In considering whether this conduct was a sufficient basis to conclude that the visa applicant was not of good character, the Tribunal noted that the need for non-citizens to demonstrate a high degree of honesty and integrity in their dealings with Australian immigration authorities had been the subject of comment in previous cases. However, the Tribunal also referred to the statement of the Full Court of the Federal Court in *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321 that the concept of good character in section 501 is concerned with whether a person's character in the sense of his or her enduring moral qualities 'is so deficient as to show it is for the public good to refuse entry'. The Tribunal considered any countervailing factors relevant to the 'bad conduct' and any recent 'good conduct'.

The Tribunal accepted that a person claiming to be in fear for their life and safety may lie in an effort to advance a claim for protection 'without necessarily laying bare any enduring deficiency of integrity or character'. The Tribunal was satisfied that the visa applicant's actions were those of a traumatised child. With regard to 'good conduct', the Tribunal noted that the visa applicant applied for a protection visa in his real name two weeks after arriving in Australia, he complied with the conditions attached to his bridging visa, he formed strong attachments with the Albanian community and had developed strong bonds with Ms Priori's family.

The Tribunal was satisfied that the visa applicant's 'good conduct' outweighed his reprehensible conduct, a conclusion consistent with what the Australian community would expect. The Tribunal set aside the Minister's decision and remitted the matter with the direction that the visa applicant did not fail the character test under section 501 of the *Migration Act 1958*.

INSURANCE

Re Slee and Australian Prudential Regulation Authority
[2006] AATA 206; 6 March 2006
Deputy President RNJ Purvis, AM, QC; Senior Member G Ettinger

Whether Mr Slee should be disqualified from holding any appointment as an actuary — Whether the Tribunal should publish its decision identifying Mr Slee

Mr Slee was the consulting actuary for HIH Insurance Limited for a number of years including between January 1997 and March 2001. In 2004, the Australian Prudential Regulation Authority (APRA) decided that Mr Slee should be disqualified from holding any appointment as an actuary of a general insurer under section 44 of the *Insurance Act 1973*. Mr Slee applied to the Tribunal for review of this decision.

The power to disqualify a person from acting as an auditor or actuary of a general insurer under section 44 of the *Insurance Act 1973* may be exercised only if the person:

- has failed to perform adequately and properly the functions and duties of such an appointment as set out in either the Insurance Act or the Prudential Standards;
- otherwise does not meet one or more of the criteria for fitness and propriety set out in the Prudential Standards; or

– does not meet the eligibility criteria for such an appointment as set out in the Prudential Standards.

Before the Tribunal, APRA argued that Mr Slee had not demonstrated competence in the conduct of business duties within the meaning of General Prudential Standard 220 issued by APRA under section 32 of the *Insurance Act 1973*. It was contended that Mr Slee had not complied with relevant professional standards and the more general standard of professional care and diligence expected of a reasonable and competent actuary in the performance of the work in question. The professional standards were said to be contained in the Code of Conduct for Actuaries and Professional Standard 300 issued by the Australian Institute of Actuaries.

Mr Slee argued that his retainer by HIH Insurance Limited was of a more limited nature than APRA contended and that he was not necessarily required to comply with Professional Standard 300. While there was no written document evidencing any contract or retainer between Mr Slee and HIH Insurance Limited, the Tribunal was satisfied on the basis of the documentation before it that Mr Slee had been retained to provide advice of a broader nature. Further, Mr Slee was required to comply with the Code of Conduct for Actuaries and Professional Standard 300. Failure to carry out his work in a manner consistent with them may evidence a lack of competence on his part as an actuary.

Mr Slee's position was that nevertheless he had complied with the requirements of the Code of Conduct and the Professional Standard. Even if he had not complied fully with the requirements, his omissions were not such as to lead to disqualification.

The Tribunal received evidence in relation to the role of an actuary in advising an insurer. It examined Mr Slee's conduct in relation to three financial periods during 1999 and 2000 and considered a number of reports that he had prepared during that time.

The Tribunal found that Mr Slee advised HIH Insurance Limited as to figures for central estimates of outstanding claims liability that did not have a 50 per cent chance of being accurate. He inappropriately assessed future claim handling costs and placed uncritical reliance on the opinion of management. Mr Slee provided inadequate documentation in his reports and failed to provide the basis for his estimates.

The Tribunal was satisfied that Mr Slee did not demonstrate competence such as to satisfy the requirements of fitness and propriety for actuaries under the General Prudential Standard 220. He failed to adhere to relevant professional standards and did not exercise the professional care and diligence expected of a reasonable and competent actuary. The Tribunal noted that this finding was no attack upon Mr Slee's honour or character but rather his competence, skill and ability to carry out the obligations of an actuary.

Mr Slee's application was heard in private in accordance with the requirement set out in section 63 of the *Insurance Act 1973*. The Tribunal considered whether the decision should be released in full with all parties identified. The Tribunal held that the requirement to hear the application in private did not prohibit it from publishing its reasons and identifying the applicant. To construe the provision otherwise would be contrary to public policy, open justice and the policy of the *Insurance Act 1973* in enabling disqualification. The Tribunal reasoned that, given the purpose of the disqualification power is to protect the public, it is important for the insurance industry and other interested parties to be informed of the status of participants.

The Tribunal affirmed the decision under review.

SOCIAL SECURITY

Re Secretary, Department of Employment and Workplace Relations and QX2006/1
[2006] AATA 372; 28 April 2006
Deputy President PE Hack, SC and
Member MJ Carstairs

Whether an overpayment of benefits occurred where the claimant used an assumed identity without any intention to defraud – Whether any overpayment should be waived

The respondent was born in March 1956. From June 1988, he commenced using another name. He obtained a driving learner's permit, opened a bank account and was sentenced to a term of imprisonment under the assumed name. The respondent's explanation for using another name was that he was part of a witness protection program and had been urged to assume a new identity by an unnamed but now deceased member of the Victorian Police. The Tribunal was satisfied that the respondent genuinely believed he was at risk and did not assume the new identity for any nefarious purpose.

Between June 1992 and April 2005, the respondent claimed for, and received, a range of social security benefits, including special benefit, job search allowance, newstart allowance and disability support pension. The respondent lodged the claims under the assumed name and gave a date of birth in May 1953. In the claim form for special benefit, he gave no answer to a question asking for his full name at birth. In the claim form for disability support pension, he ticked the 'No' box in relation to whether he had had any other name.

In June 2004, Centrelink commenced an investigation into the respondent's identity. He was interviewed and provided his birth name and family details, expressing concern that details regarding his birth name were contained in certain records. Centrelink cancelled payment of the disability support pension and invited the respondent to lodge an application using his 'true and correct' name. He did so and the disability support pension was granted with effect from 5 May 2005.

Overpayments were raised against the respondent amounting to more than $120,000. On review, the Social Security Appeals Tribunal determined that the respondent had not been overpaid. The Secretary, Department of Employment and Workplace Relations sought review of this decision.

The Secretary argued that, because the respondent claimed benefits under an assumed identity, he was not entitled to be paid those benefits and must repay them. This was so even though the Secretary conceded that, if the respondent had applied for the benefits in his birth name, he would have received those benefits in the amount that he in fact received.

The Tribunal identified the provisions of the *Social Security Act 1991* that govern whether an overpayment of benefits had occurred at the relevant times and noted that the issues for determination were:

- whether a false statement or false representation (or misrepresentation) had been made;
- whether there had been a failure or omission to comply with (or contravention of) the social security law; and
- if either or both of these were answered in the affirmative, whether a social security payment was made because of (or as a result of) such matters.

If there was a debt, the Tribunal would then consider whether it should be waived under section 1237AAD of the *Social Security Act 1991*.

The Tribunal noted that it is well settled in case law that a person may assume and use another name provided its use is not calculated to deceive or cause pecuniary loss. The respondent was entitled to use a name other than his birth name and this did not involve the making of a false statement, false representation or misrepresentation.

However, the Tribunal was satisfied that the provision of a date of birth in May 1953 on the claim forms did constitute a false statement.

The respondent's failure to answer the question asking for his full name at birth was an omission conveying a false representation that the name given on the form was his birth name. Further, the negative answer to the question as to whether the respondent had had any other names was a false statement. These actions constituted a failure to comply with the social security law.

The Tribunal considered the proper construction of the overpayment provisions and held that falsity must be material to the payments made. That is, it must be shown that the payments would not have been made, either at all or in the same amount, had the true position been revealed. The Tribunal found that the payments received by the respondent were not paid because of, or as a result of, any falsity. The amounts would have been paid even if his 'true' position had been known. On this basis, the Tribunal found that no overpayment was made.

The Tribunal held that, had it been necessary to consider the question of waiver, it would have been of the view that each of the matters in section 1237AAD was established and that the debt should be waived. In particular, the debt did not result wholly or partly from the respondent making a false statement or false representation or knowingly failing or omitting to comply with a provision of the legislation.

The Tribunal was satisfied that the fact that the payments made were identical to those to which the respondent would have been entitled had he applied in his own name constituted special circumstances that would make it desirable to waive the debt.

The Tribunal affirmed the decision under review.

TAXATION

Re South Sydney Junior Rugby League Club Limited and Commissioner of Taxation
[2006] AATA 265; 21 March 2006
Deputy President J Block

Whether the Club is exempt from income tax on the basis that it is established for the encouragement of a game or sport

The South Sydney Junior Rugby League Club (the Club) is a highly profitable licensed club. The Commissioner of Taxation decided that the Club was not exempt from income tax for the financial years from 1999–2000 to 2002–03. The Club sought review of this decision arguing that, while it is a highly profitable organisation, its main purpose during the relevant years was the encouragement of rugby league.

Division 50 of the *Income Tax Assessment Act 1997* defines the range of entities that are exempt from the requirement to pay income tax. Pursuant to sections 50-1 and 50-45, a society, association or club established for the encouragement of a game or sport will be regarded as an exempt entity subject to certain conditions. The conditions were not in issue in this case.

The Federal Court has considered on a number of occasions whether clubs of a similar kind are eligible for tax-exempt status. In *Cronulla-Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82, the Full Court of the Federal Court held that, in order for a club to qualify for the exemption, the club's main object or purpose must be to encourage or promote an athletic game or athletic sport in which human beings are the sole participants. Any other activities must be regarded as incidental, ancillary or secondary to its devotion to sport. The Court determined that the Cronulla–Sutherland Leagues Club was not eligible for the exemption.

In *St Mary's Rugby League Club Ltd v Commissioner of Taxation* (1997) 36 ATR 281, the Federal Court held that the club did meet the exempt entity requirements. Although the social

activities of the club were significant, they were subordinate to the activities of the club in encouraging and promoting rugby league. Of particular note was the number of teams the club fielded, the provision of a sporting field and evidence that persuaded the court that people were drawn to membership because of their involvement or interest in rugby league.

The Tribunal considered a significant amount of evidence relating to the activities of the Club and found that they ranged from providing entertainment and extensive gaming facilities to a tourist hotel and a facility for home and business loans. The Tribunal also considered the Club's relationship with a number of associated entities, including the South Sydney District Junior Rugby Football League Limited, which administers junior rugby league in South Sydney, and the Souths Juniors Sporting Association Limited, which was a vehicle for investing money to generate income for rugby league activities.

The Club admitted that its principal activity was the operation of a licensed club but contended that its revenue-raising activities encouraged rugby league to the extent required by the legislation. It referred the Tribunal to:

– substantial cash donations made to the junior and senior rugby league clubs; and
– contributions made to the maintenance of a field even though it did not provide a field itself.

The Club contended that there were crucial factual differences between its operations and those of the Cronulla–Sutherland Leagues Club:

– the Club in this case was under the control of the South Sydney District Junior Rugby Football League Limited, which must appoint four of the seven directors of the Club pursuant to the Club's Articles of Association;
– the Club provided significantly more direct financial support to the football clubs than was the case with the Cronulla-Sutherland Leagues Club; and
– the Club provided extensive non-cash support to the South Sydney District Junior Rugby Football League Limited.

The Club also noted that the Commissioner granted the exemption in the 2003–04 financial year.

The Tribunal held that the fact that the Club was granted an exemption in 2003–04 was not relevant to considering eligibility during the earlier years. Further, the Tribunal was not satisfied that the Souths Juniors Sporting Association Limited's financial results should be consolidated with those of the Club. Even if they were, the Tribunal did not consider that there would be a material difference to the outcome.

The Tribunal noted that the amount of money distributed by the Club is relevant to the question of whether the entity is exempt but not determinative. While it was satisfied that the Club made substantial cash donations to the South Sydney District Junior Rugby Football League Limited, the Tribunal was unable to determine the precise proportion of profits devoted to rugby league and did not consider them to be as high as claimed by the Club. The evidence before the Tribunal did not allow for the proper calculation of the provision of non-cash support by the Club.

In relation to the availability of a field, the Tribunal noted that, while the Club contributed to the maintenance of a field, it did not make a field available for rugby league at a nominal cost as did Cronulla–Sutherland Leagues Club. Nor does the Club field any teams itself.

The Tribunal found that, while the directors of the Club were involved in rugby league, there was no evidence that the members or a substantial body of them were interested in rugby league to any significant extent. The Tribunal considered it likely that the members were primary or solely interested in the numerous and various benefits offered to members. A significant number of non-members used the Club's facilities and it was suggested that they were only interested in the facilities on offer. The Tribunal did not accept that

the Club was seeking to maximise its profits in order to benefit rugby league. Profits were retained to expand and diversify the activities of the Club in the interests of its members.

The Tribunal held that rugby league was not the main object or even an object equal to that of the licensed club itself during the relevant years. The Tribunal held that the Commissioner of Taxation's decision should be affirmed.

VETERANS' AFFAIRS

Re Wild and Repatriation Commission
[2005] AATA 670; 13 July 2005
Senior Member BJ McCabe

Whether conditions suffered by the veteran are related to his service aboard the HMAS Melbourne

Mr Wild had two periods of operational service on board the HMAS *Melbourne* between 1959 and 1962. He performed a variety of roles in relation to the aircraft that landed and took off from the aircraft carrier. During his second period of operational service, Mr Wild served as a 'hook-man'.

The role of hook-man was regarded as one of the most dangerous jobs on an aircraft carrier. Aircraft would approach the ship at a speed of about 120 miles per hour. Pilots relied on mirrors and signals from the flight-deck to negotiate the approach towards the narrow flight-deck that might be pitching and rolling according to the conditions. Six thick cables were strung out across the deck. The pilot would land so as to catch one of the cables on a hook attached to the plane's fuselage and halt the plane. Ideally, a pilot would catch the first or second cable. Less tidy landings would rely on cables laid further down the flight-deck.

As a plane touched down and picked up an arrestor cable, the hook-man would run towards where the aircraft would likely come to rest. If the aircraft was a Sea Venom jet, there was an automatic hook release. If the automatic release malfunctioned, the hook-man might have to manually release the cable from the hook. The Gannet propeller-driven planes did not have any automatic release mechanism. The hook-man was required to run in behind the aircraft and wrestle the wire from the hook. He had to take care to dodge propellers, remain balanced on the sometimes heaving deck and stay clear of propeller wash and exhaust fumes. Sometimes the aircraft were armed. Occasionally rockets would malfunction and an aircraft would land with a rocket hanging loose from its bracket on the wing.

Mr Wild claimed he suffered stress and anxiety during his work as a hook-man. This contributed to the development of post traumatic stress disorder (PTSD). He drank to relieve the stress and developed an alcohol abuse problem, which led to gastro-oesophageal reflux disease. On the medical evidence, the Tribunal was satisfied that Mr Wild suffered from all three conditions.

The Repatriation Commission argued that the material before the Tribunal did not point to a hypothesis connecting Mr Wild's service with his conditions. In particular, there was no identifiable event or incident that could be identified as a factor in the development of PTSD or the alcohol abuse condition for the purposes of the relevant Statements of Principles. Relying on the decision of the Full Court of the Federal Court in *Repatriation Commission v Stoddart* (2003) 134 FCR 392, the Repatriation Commission argued that very stressful jobs cannot give rise to a threat of injury or death if the risk of harm only arises when something goes wrong. In the absence of evidence that something has gone wrong, a person in Mr Wild's position with his training and background would not perceive there to be a threat.

The Tribunal considered that Mr Wild's job comprised a series of events within the meaning of the relevant Statements of Principles. The decision in Stoddart required the Tribunal to have regard to how a person with Mr Wild's background and experience would perceive those events. The Tribunal noted Mr Wild's evidence that he was terrified every time he went onto the flight-deck and that he was always conscious of the risk of death or serious injury. The evidence suggested that his job exposed him to more serious threats than other service jobs and the risk of things going wrong was high, particularly

at night and in rough seas. While people performing dangerous jobs might be expected to be prepared for, or become accustomed to, the risks they faced whether because of temperament, training or experience, Mr Wild did not volunteer for the position and the training was limited. The Tribunal was satisfied that the material pointed to a hypothesis linking Mr Wild's service to his claimed conditions.

The Tribunal then considered whether the hypothesis raised by Mr Wild was consistent with the Statements of Principles for the claimed conditions. In relation to PTSD, the Tribunal was satisfied that any person with Mr Wild's experience, training and background would reasonably perceive the events involved in his work as threats of death or serious injury. The material supported the contention that Mr Wild experienced a severe stressor, meeting one of the factors set out in the Statement of Principles.

The Tribunal noted that, if Mr Wild's PTSD was connected to service, the Statements of Principles concerning alcohol abuse and gastro-oesophageal reflux disease would also be met. The evidence was that Mr Wild's problem with alcohol started after he began work as a hook-man. One of the factors in the Statement of Principles is that the veteran was suffering from a psychiatric disorder at the time of the clinical onset of the condition. In relation to the reflux condition, the medical evidence was that the alcohol abuse condition was present at the time of the development of the disease. This met one of the factors in the Statement of Principles for the reflux condition.

The Tribunal accepted Mr Wild was an honest witness who did not exaggerate his story. As Mr Wild's hypothesis could not be disproved beyond reasonable doubt, the Tribunal was satisfied the three claimed conditions were war-caused. The Tribunal set aside the decision and remitted the matter to the Repatriation Commission to calculate the amount of pension payable.

WORKERS' COMPENSATION

Re Peisley and Telstra Corporation Limited
[2005] AATA 929; 26 September 2005
Justice GK Downes, AM, QC; Senior Member JW Constance; Dr MD Miller, Member

Whether various forms of overtime should be taken into account in calculating the amount of compensation payable to an injured worker

Mr Peisley was employed by Telstra as an installer/repairer when he injured his right shoulder at work in October 2002. Mr Peisley continued working on a restricted basis, one such restriction being that he could not work overtime.

Before his injury, Mr Peisley worked hours additional to his 'ordinary hours' in three different situations:

(a) work after ordinary hours when extra time was needed to finish a job;

(b) weekend work, which was usually arranged during the previous week; and

(c) recall work, which was undertaken to complete urgent repair jobs.

In each situation, it was Mr Peisley's choice to undertake the additional work when the need arose. He was never directed to do overtime to which he had not agreed.

Telstra accepted liability to compensate Mr Peisley for the loss suffered as a result of the injury to his shoulder. In calculating his normal weekly earnings for the purposes of determining the amount of compensation to be paid, Telstra did not take into account the additional hours that Mr Peisley worked prior to the injury. Mr Peisley applied for review of Telstra's decision on the amount of compensation payable.

An employee's normal weekly earnings are calculated in accordance with section 8 of the *Safety, Rehabilitation and Compensation Act 1988*. It provides that an additional amount is to be included where an employee is required to work overtime on a regular basis.

Telstra argued that Mr Peisley had not been required to work overtime on a regular basis within the meaning of the Act.

The Tribunal noted that neither the Act nor the workplace agreements relating to Mr Peisley's employment defined 'overtime' but that the term is commonly understood to be work performed outside an employee's normal working hours. The Tribunal held that, for the purposes of section 8 of the Act, any work done outside normal hours is overtime.

In relation to whether Mr Peisley was 'required' to work overtime, Telstra argued that the Tribunal should follow the decision in *Re Zarb and Comcare* (1997) 48 ALD 718. In that case, it was held that the word 'required' involved the imposition, by the employer in an authoritative fashion, of an obligation upon the employee to work overtime. Considering the statutory context in which the provision appears and the beneficial nature of the Act, the Tribunal held that this interpretation should no longer be followed.

The Tribunal pointed out that each individual occasion on which overtime was worked was the result of an agreement between the parties. Once an agreement to do the work was in place, Mr Peisley was no longer simply a volunteer. It was the existence of this agreement, whether or not it amounted to a binding contractual obligation, which led to Mr Peisley working overtime and thus brings it within the normal usage of the word 'required'. The moment both Telstra and Mr Peisley agreed that he would do the work, he was required to undertake the work.

In considering whether Mr Peisley was required to work overtime 'on a regular basis', the Tribunal disagreed with the view expressed in Re Zarb that 'regular' means a uniform or symmetrical pattern of hours worked overtime, which can be described as usual or customary.

The Tribunal held that it is the requirement to work overtime not the overtime itself that must be considered. Use of the phrase 'on a regular basis' makes clear that it is the requirement to work rather than the hours worked on any particular occasion that must be regular.

The Tribunal concluded that the additional hours worked by Mr Peisley should be taken into account in determining his normal weekly earnings for the purposes of the Act. On appeal, the Full Court of the Federal Court found no error in the Tribunal's interpretation of the relevant provisions of the Act.