Appendix // 07
Decisions of interest

Archives and Freedom of Information

Pemberton and Director General, National Archives of Australia

[2015] AATA 115; 27 February 2015
Senior Member Dr James Popple

Whether access should be granted under the Archives Act 1983 to the personnel files of military college cadets

Mr Pemberton applied under the *Archives Act 1983* (the Act) for access to the personal files of 11 staff cadets who attended the Royal Military College, Duntroon in the 1970s. The National Archives of Australia (the Archives) refused access to parts of the files. On internal reconsideration, the Archives decided to release further pages from each of the files, but otherwise affirmed its original decisions. The applicant applied to the Tribunal for review of those decisions.

The main issue for the Tribunal was whether any parts of the requested files were exempt under section 33(1)(g) of the Act on the basis that their release would involve unreasonable disclosure of information relating to personal affairs. In reaching its decision, the Tribunal also had to consider what, if any, weight it should give to the Archives' policy on the application of the exemption.

The Tribunal held that the policy had to be taken into account even though it was finalised after the decisions under review were made and even if it represented a more restrictive approach to the release of information. The policy could be given some weight as it was consistent with the Act and successfully struck a balance between the interests of good government and consistent decision-making on the one hand and the ideal of justice in the individual case on the other.

In interpreting section 33(1)(g) of the Act, the Tribunal had regard to Federal Court decisions relating to an analogous provision previously in the *Freedom of Information Act 1982*. The Tribunal examined the files, noting that they included applications for admission to the College, reports of progress and correspondence about medical conditions and financial affairs. Each of the files was found to contain information relating to the personal affairs of the cadets and, in some cases, other persons.

The Tribunal held that, whether disclosure would be unreasonable is a question of fact and degree that requires balancing all legitimate interests and consideration of the public interest, including the public interest in the protection of personal privacy. Evidence before the Tribunal included affidavits from some of the cadets, from the Chief of Army and from office holders of the Australian Defence Force Association, the Defence Force Welfare Association and Defence Families Australia about their concerns regarding the release of information of the kind in the files. The Tribunal considered the nature and perceived sensitivity of the information, the age and current relevance of the information, the age of the subjects, the fact that none of the information was in the public domain, the scholarly interest in the files, the ease with which disclosed information could be disseminated and the increased level of community concern about information privacy. The Tribunal concluded that disclosure of the information would be unreasonable.

The Tribunal affirmed the decisions under review.

Sweeney and Australian Information Commissioner and Australian Securities and Investments Commission
Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority

[2014] AATA 531; 4 August 2014
[2014] AATA 539; 6 August 2014
Deputy President James Constance

Whether the applicant should be declared a vexatious applicant under the Freedom of Information Act 1982

Mr Sweeney has been seeking to expose what he believes is fraudulent conduct involving the administration of a superannuation fund of which he was a member. From 2009, Mr Sweeney made numerous requests to the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) for access to documents under the *Freedom of Information Act 1982* (the Act). Between 1 November 2010 and 9 August 2013 Mr Sweeney made at least 143 requests to ASIC and 118 requests to APRA.

Following applications by ASIC and APRA, the Australian Information Commissioner (the Commissioner) made two separate declarations under section 89K(1) of the Act that Mr Sweeney was a vexatious applicant. The Commissioner declared that, until 9 August 2014, ASIC and APRA were not required to consider any request or application made by Mr Sweeney unless the Commissioner granted permission for the request or application to be made. Mr Sweeney applied to the Tribunal for review of the Commissioner's decisions to make the declarations.

The Tribunal identified the issues for determination as whether Mr Sweeney had repeatedly engaged in access actions involving an abuse of process and, if so, whether a vexatious applicant declaration should be made. ASIC and APRA contended the declarations should be extended to 1 January 2016.

Evidence before the Tribunal was that, in addition to the requests made prior to the making of the declarations, Mr Sweeney had continued to make requests to ASIC and APRA under various pseudonyms without the permission of the Commissioner. He made one application to the Commissioner for permission to apply to APRA, but permission was denied.

The Tribunal was satisfied that Mr Sweeney had repeatedly engaged in access actions and found this repeated engagement involved an abuse of process in two respects. Firstly, Mr Sweeney's conduct involved harassment of at least one ASIC employee. Secondly, his conduct unreasonably interfered with the operations of ASIC and APRA. In making this finding, the Tribunal had regard to a range of matters, including the volume and frequency of Mr Sweeney's requests, the time taken to process the requests, the number of requests that were for access to documents he had already provided to ASIC and the number of repeat requests for documents previously sought.

In deciding whether to exercise the discretion to make a declaration, the Tribunal considered the objects of the Act and whether Mr Sweeney's actions indicated that his exercise of the rights the Act provides had gone beyond achieving those objects. Having regard to the number and nature of access actions, the Tribunal determined it was reasonable to make declarations to restrict his use of the Act.

The Tribunal noted that, notwithstanding Mr Sweeney's actions, his legitimate concerns about the administration of the superannuation fund should not be underestimated. It would not be reasonable to extend the declarations to 1 January 2016 and restrict Mr Sweeney's rights for such a lengthy period. The Tribunal also considered that the terms of the declarations made by the Commissioner were unduly harsh in the circumstances. The right to seek information

under the Act is of such importance that a requirement to seek the Commissioner's permission before making a request should only be imposed in the most compelling circumstances.

In relation to ASIC, the Tribunal determined that the preferable decision would be to set aside the Commissioner's declaration and substitute a revised declaration which would remain in force until 1 January 2015. The declaration set out a number of terms and conditions, including limiting the number and frequency of access requests Mr Sweeney could make and the scope of what could be requested as well as preventing him from using pseudonyms or using an agent.

In relation to APRA, the Tribunal did not consider Mr Sweeney should be further restrained from exercising his rights under the Act after 9 August 2014. The Tribunal affirmed the Commissioner's decision.

Aviation

Jones and Civil Aviation Safety Authority

[2014] AATA 820; 31 October 2014
Senior Member Bernard McCabe

Whether the applicant's pilot licences should be varied, suspended or cancelled because of incidents that occurred during the filming of a television series

Mr Jones held flight crew licences that included a private helicopter pilot licence. The Civil Aviation Safety Authority (CASA) reviewed footage shot in the course of a reality television series based on the life of Mr Jones, his family and employees on the Coolibah Station in the Northern Territory. The television series featured a number of incidents that CASA found to be in breach of the rules and regulations applicable to helicopter pilots. CASA decided to cancel Mr Jones's licences and Mr Jones applied to the Tribunal for review of the decision.

The *Civil Aviation Regulations 1988* allow CASA to vary, suspend or cancel a licence on a number of grounds, including where the holder:

- has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft, or
- is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such a licence.

The Tribunal was required to determine whether any of the incidents and matters raised by CASA contravened the laws regulating civil aviation and, if so, whether Mr Jones's licences should be varied, suspended or cancelled.

The Tribunal found that a number of the incidents and matters did involve contraventions of the applicable rules by Mr Jones. These included engaging in aerial photography without holding a commercial pilot's licence, leaving a helicopter unattended while the engine was running, staging a race in a helicopter against his brother-in-law on a jet ski, towing his son on a wave board, attempting to snare and tow a crocodile, failing to wear seat belts correctly and allowing his son to start a helicopter engine.

While he was not involved in as many contraventions as CASA contended, the Tribunal found that Mr Jones had engaged in a pattern of conduct that demonstrated a poor knowledge of both the law and applicable flight manuals and safety notices as well as an unhealthy attitude towards risk and flawed judgment and decision-making skills. The Tribunal was satisfied that Mr Jones had failed in his duty with respect to the safe navigation and operation of aircraft. It also found that he was not a fit and proper person to hold a pilot's licence.

In relation to whether Mr Jones's licences should be varied, suspended or cancelled, the Tribunal considered regulatory action was required but it was not satisfied that cancellation was necessary or appropriate. It concluded that Mr Jones's identified shortcomings, while serious, could be addressed through appropriate training and testing.

The Tribunal set aside CASA's decision and ordered that Mr Jones's licences be suspended until he is able to demonstrate by seeking and receiving an appropriate certification that he has attended to the gaps in his knowledge and has the decision-making skills required for the flight crew licences he holds.

National Disability Insurance Scheme

ZNDV and National Disability Insurance Agency

[2014] AATA 921; 25 November 2014
Deputy President Katherine Bean and Member Ian Thompson

Whether the National Disability Insurance Scheme should fund an occupational therapy room and equipment

The applicant, a five-year old child with Asperger's syndrome, was accepted as a participant in the National Disability Insurance Scheme (NDIS). The National Disability Insurance Agency (NDIA) approved a plan setting out a range of supports that would be funded under the NDIS. Additional supports requested by the applicant's family were not approved, including funding for equipment which would allow them to set up an occupational therapy room for use in the family home. The NDIA was not satisfied that funding for a sensory room and associated equipment was a reasonable and necessary support under section 34 of the *National Disability Insurance Scheme Act 2013*.

The applicant's mother applied for an internal review of the NDIA's decision. The original decision was varied in certain respects. However, the part of the decision denying the request for the occupational therapy equipment was not changed. The applicant's mother applied to the Tribunal for review of the internal review decision.

The primary issue for the Tribunal to determine was whether the applicant's plan should be varied to include funding of approximately $10,000 for the occupational therapy equipment. The Tribunal noted that, in deciding whether a support is reasonable and necessary, each of a number of criteria must be satisfied, including:

- the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative supports, and
- the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice.

It was contended for the applicant that he would be likely to derive the following benefits from having an occupational therapy room at home: the development of gross and fine motor skills, body awareness, physical development and confidence, strength, muscle tone and postural control, motor coordination, modulation of arousal, and self-regulation and management of anxiety/reduction of stress levels. The evidence before the Tribunal was that the applicant was progressing well in each of the areas relating to physical development compared with other children his age and the Tribunal was not persuaded that he required the room to assist in these areas.

The Tribunal accepted that the applicant required assistance in the areas of anxiety and arousal management and self-regulation. However, it also accepted expert evidence that an occupational therapy room has not been shown to be effective in assisting with these issues.

The expert evidence was that cognitive behaviour therapy and movement breaks have been shown to be effective.

The Tribunal concluded that, given the significant cost, the provision of the equipment would not represent value for money. For the same reasons, the Tribunal would not have been satisfied that the room would be, or be likely to be, effective and beneficial for the applicant having regard to current good practice.

During the course of the review, the parties agreed that certain other additional supports should be included in the plan. The Tribunal varied the decision under review to give effect to the agreement.

National Security And Passports

MYVC and Director-General of Security
MYVC and Minister for Foreign Affairs

[2014] AATA 511; 28 July 2014
Deputy President Robin Handley, Senior Member Geri Ettinger and Senior Member Jill Toohey

Whether ASIO had reasonable grounds to suspect the applicant would be likely to engage in conduct that might prejudice the security of Australia – whether the applicant's passport should be cancelled

MYVC arrived in Australia in 2002 and became a citizen in 2006. He subsequently spent significant time outside Australia. In 2012, he was interviewed by officers of the Australian Security Intelligence Organisation (ASIO) about alleged involvement in people smuggling activities which he denied. In 2013, the Director-General of Security made an adverse security assessment and requested that the Minister for Foreign Affairs cancel MYVC's passport and refuse to issue him a new passport should he reapply. The Minister accepted the recommendation and decided to cancel MYVC's passport. MYVC applied to the Tribunal for a review of the adverse security assessment and the Minister's decision to cancel his passport.

The functions of ASIO include advising Ministers and Commonwealth authorities in respect of matters relating to security. The term "security" is defined in the *Australian Security Intelligence Organisation Act 1979* which was amended in 2010 to include the protection of Australia's territorial and border integrity from serious threats. Section 14 of the *Australian Passports Act 2005* provides that ASIO can request the refusal or cancellation of an Australian passport if it suspects on reasonable grounds that the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country and that the person should be refused a passport in order to prevent the person from engaging in that conduct.

In accordance with the procedure for reviews of this kind set out in the *Administrative Appeals Tribunal Act 1975*, the material before the Tribunal included both open and closed evidence and submissions. The closed evidence and submissions were the subject of Ministerial certificates and could not be disclosed to MYVC. The Tribunal undertook to put any questions identified by MYVC's representative to ASIO's witness in the part of the hearing conducted in the absence of MYVC or his representative.

MYVC's evidence to the Tribunal was that he had had no involvement in people smuggling activities, nor earned any money from such activities. His travel to different countries was for the purposes of his business or to visit his family. However, the Tribunal was satisfied from the evidence subject to the Ministerial certificates that MYVC had been involved in people smuggling activities for a number of years, facilitating the arrival in Australia of a significant number of people. He had derived substantial earnings from these activities.

The Tribunal held that organised people smuggling could pose a serious threat to Australia's border integrity and therefore falls within the definition of "security". While not satisfied on the

open evidence alone, the Tribunal was satisfied from the closed evidence that the Director-General could suspect on reasonable grounds that, if MYVC holds an Australian passport, he would be likely to engage in conduct which might prejudice the security of Australia and that denying him a passport would have an important preventative effect on his ability to engage in people smuggling activities. The Tribunal was also satisfied there were strong grounds supporting the exercise of the Minister's powers to cancel MYVC's passport.

The Tribunal affirmed the decisions under review.

Social Security

Hananeia and Secretary, Attorney-General's Department

[2015] AATA 319; 14 May 2015
Deputy President Stanley Hotop

Whether the applicant was entitled to an Australian Victim of Terrorism Overseas Payment

Mr Hananeia was an Australian resident who was holidaying in Bali in October 2002. When the bombing at the Sari Club occurred, he was at his hotel which was located approximately 600 metres in a straight line from the Sari Club or 1.9 kilometres by road. Mr Hananeia went to the bomb site, arriving about 10 to 15 minutes later. He said he tried to help people when he first arrived but left after a certain amount of time. He returned later that night and again the next morning to do some filming before leaving Bali later that day. Following his return to Australia, Mr Hananeia was diagnosed with post-traumatic stress disorder.

In December 2013, Mr Hananeia applied for an Australian Victim of Terrorism Overseas Payment (AVTOP) but his claim was refused. The decision was affirmed on internal review and by the Social Security Appeals Tribunal (SSAT). Mr Hananeia applied to the Tribunal for review of the SSAT's decision.

To qualify for an AVTOP under section 1061PAA of the *Social Security Act 1991* (the Act), a person must, among other criteria, be a primary victim or a secondary victim of a declared overseas terrorist act. A primary victim is a person who was in the place where the terrorist act occurred and was harmed as a direct result of the terrorist act. The Prime Minster has made a declaration that the Bali bombings are a declared overseas terrorist act.

The primary issue before the Tribunal was whether Mr Hananeia was in the place where the terrorist act occurred. The Tribunal held that the Prime Minister's declaration specifies for the purposes of the Act the place or location where the relevant terrorist act occurred. In this case, the requirements of the Act could only be satisfied if Mr Hananeia was "at the Sari Club, Kuta". The Tribunal also held that, while the Act does not expressly include a temporal element, such a temporal requirement is necessarily to be implied. The person must be in the place where the terrorist act occurred at the time when it occurred.

The Tribunal concluded that, as Mr Hananeia was neither in the place where the declared overseas terrorist act occurred nor in close proximity to that place, he did not qualify for the AVTOP. The Tribunal also found that the harm to Mr Hananeia's mental health was not as a direct result of the terrorist act but suffered as a result of his voluntarily and unnecessarily attending the site of the terrorist act after it occurred.

The Tribunal affirmed the decision under review.

Rus and Secretary, Attorney-General's Department

[2015] AATA 367; 28 May 2015
Senior Member John Handley

Whether the Tribunal should extend the time for an applicant to lodge an application for review of a decision about entitlement to an Australian Victim of Terrorism Overseas Payment

Ms Rus is an Australian resident who was travelling to her workplace in London when terrorist acts took place on 7 July 2005. The Tube train on which she was travelling was stopped and all passengers were asked to alight. Ms Rus then boarded a No. 18 bus in Tavistock Square. She considered boarding a No. 30 bus but decided to stay where she was. After the bus was redirected, Ms Rus alighted and started walking towards her office. When she was 142 metres from Tavistock Square, she heard an explosion and felt a tremor. She did not have direct line of sight to Tavistock Square. She became aware that a No. 30 bus had been blown up in Tavistock Square after looking at the news online when she got to work. A few weeks after the bombings, Ms Rus suffered a stroke. She was also later diagnosed with post-traumatic stress disorder.

In September 2014, Ms Rus applied for an AVTOP but her claim was refused. This primary decision was affirmed on internal review and by the SSAT. Ms Rus applied to the Tribunal for review of the SSAT's decision. As the application was lodged outside the 28-day time limit, Ms Rus applied to the Tribunal to extend the time to lodge her application. The Secretary opposed the application. In deciding whether to grant the extension of time, the Tribunal was required to determine whether her application had some prospect of success if the time was extended.

The Prime Minister has made a declaration that the bus bombing at Tavistock Square on 7 July 2005 is a declared overseas terrorist act. The primary issue for the Tribunal was whether Ms Rus was in the place where the terrorist act occurred.

The Tribunal held that the words "in the place" are intended to mean within the immediate vicinity of or close proximity to the location of the terrorist act. In this case, the place where the terrorist attack occurred was in Tavistock Square. The Tribunal found that Ms Rus was not in the immediate vicinity of or in close proximity to that place. Although she was aware that something was happening within her vicinity, she did not know that the bombing had occurred until she arrived at her workplace and saw photographs on the Internet.

The Tribunal was satisfied that Ms Rus would have no prospect of success and that granting an extension of time to commence the proceedings would be futile. The Tribunal refused the application.

Sharp and Secretary, Department of Social Services

[2015] AATA 127; 6 March 2015
Member Regina Perton

Whether the applicant was entitled to receive parenting payment – use of material from Facebook as evidence in deciding whether the applicant was a member of a couple

Ms Sharp and Mr O'Brien had an intermittent relationship which ended in mid-2009 when she was pregnant with their first child. In 2012, they bought a three-storey, four-bedroom house which they owned as joint tenants so their son had a better environment and to enable Mr O'Brien to spend time with him. Ms Sharp and Mr O'Brien had separate bedrooms on different floors of the property. In January 2014, Ms Sharp announced on Facebook that she and Mr O'Brien were "expecting a little girl". She responded to congratulatory posts from friends and family with comments including "it's been a long road" and "we are over the moon".

In May 2014, Centrelink cancelled Ms Sharp's parenting payment on the basis that she and Mr O'Brien were members of a couple. This primary decision was affirmed on internal review and by the SSAT. Ms Sharp applied to the Tribunal for a review of the decision.

In deciding whether Ms Sharp was a member of a couple as defined in section 4 of the *Social Security Act 1991*, the Tribunal was required to have regard to all the circumstances of the relationship at May 2014, including the financial aspects of the relationship, the nature of their household, the social aspects of the relationship, any sexual relationship between them and the nature of their commitment to each other. In relation to the social aspects of their relationship, there was evidence that Ms Sharp and Mr O'Brien had started holidaying at a particular camping ground when they were first together and this had continued despite the change in their relationship. A Facebook entry showed they had stayed there from Boxing Day in 2013.

The Tribunal noted that Ms Sharp and Mr O'Brien did not consider themselves to be in a de facto relationship. However, the nature of their property ownership as joint tenants was an objective indicator of the way a couple would purchase a property and also indicated a pooling of financial resources. The announcement of the pregnancy on Facebook seemed to point to a desired baby that both Ms Sharp and Mr O'Brien were excited about. Taking into account the criteria as a whole, the Tribunal found that Ms Sharp was a member of a couple in May 2014.

The Tribunal affirmed the decision to cancel Ms Sharp's parenting payment.

Sports Anti-Doping

Kennedy and Anti-Doping Rule Violation Panel and Chief Executive Officer, Australian Sports Anti-Doping Authority
Earl and Anti-Doping Rule Violation Panel and Chief Executive Officer, Australian Sports Anti-Doping Authority

[2014] AATA 967; 31 December 2014
[2014] AATA 968; 31 December 2014
Deputy President Stephen Frost

Whether entries made on the Anti-Doping Rule Violation Panel's Register of Findings relating to "possible non-presence anti-doping rule violations" by two professional sportsmen should be upheld

The applicants were professional sportsmen playing in the National Rugby League (NRL) competition. The Anti-Doping Rule Violation Panel formed a view that it was possible that each of the applicants had contravened the National Anti-Doping Scheme (NAD Scheme) set out in the *Australian Sports Anti-Doping Authority Regulations 2006*. Neither of the applicants was the subject of an "adverse analytical finding" (such as the presence of a prohibited substance in their blood or urine sample), but the Panel considered that it was possible that they had attempted to use, or possessed (or in Mr Earl's case, actually used) a prohibited substance. Whether the applicants actually committed a non-presence anti-doping rule violation would be considered by the NRL's Anti-Doping Tribunal.

The information relied on by the Panel to make its findings had been provided to it by the Australian Sports Anti-Doping Authority (ASADA). ASADA had obtained the information from the Australian Crime Commission (ACC), which in turn had obtained it from the Australian Customs and Border Protection Service (Customs Service).

The applicants claimed that the information in the possession of the Customs Service, which it had sourced from another individual known to the applicants, had been obtained unlawfully. The information was held on a mobile phone carried by that individual when he arrived at Sydney airport on a flight from overseas. The applicants accepted that the Customs officers were entitled to read the contents of the mobile phone, but they were not empowered to make a copy of those contents, which they did. The applicants claimed that the Customs Service should not have provided the copied material to the ACC and that the ACC should not have made the material available to ASADA. The applicants claimed that the Panel should not have had regard

to the information sourced in that way, and submitted that the Tribunal should set aside the findings of the Panel because the information had been obtained and used improperly.

The Tribunal found that the copying of the material by the Customs officers was authorised by the *Customs Act 1901*. The Customs Service was under an obligation to provide the material to the ACC in response to the ACC's formal notice requiring its production, and the ACC was authorised to disseminate the material to ASADA. Accordingly, the Panel was entitled to take the material into account in deciding whether to make the entries on the Register of Findings.

The Tribunal then considered whether the findings made by the Panel in relation to the possible non-presence anti-doping rule violations should be affirmed or set aside. The Tribunal held that the NAD Scheme contemplates that a relevant finding would only be made if there were material available which, rationally analysed, could support a finding that it is possible that an athlete has committed a violation. In respect of Mr Kennedy, the Tribunal concluded that all the findings were justified, and the Panel's decision to make the relevant entries on the Register was affirmed. In respect of Mr Earl, the Tribunal concluded that most, but not all, of the Panel's findings were justified. The Tribunal set aside those findings that were not justified, and substituted a decision that the entries should not be made. The remaining entries were affirmed.

Taxation

GHP 104 160 689 Pty Ltd and Commissioner of Taxation

[2014] AATA 515; 29 July 2014
[2014] AATA 869; 24 November 2014
President Justice Duncan Kerr

Whether the applicant was entitled to deductions for research and development expenditure at a premium rate

The applicant was carrying out mining operations at a number of sites in Australia. Over several income tax years, related companies undertook research and development activities directed to developing knowledge and increasing the effectiveness of their copper and lead-zinc concentrators and a copper smelter. Plant trials were conducted to test changes under ordinary operational conditions and to assess the impacts of the changes.

The company claimed that it was entitled to deductions at the premium rate of 125 per cent for a considerable part of the expenditure incurred during the plant trials in accordance with section 73B of the *Income Tax Assessment Act 1936* (the Act). For each of the relevant income tax years, the Commissioner of Taxation disallowed many of the items of expenditure. The company applied to the Tribunal for review of these decisions.

There were two main issues for the Tribunal to decide:

- whether the disputed expenditure was feedstock expenditure which is expressly excluded from the statutory definition of research and development expenditure, and
- whether overlap between the company's research and development activities in respect of its Mt Isa copper concentrator and smelter meant that certain expenditure became feedstock expenditure.

Feedstock expenditure was defined in the Act to mean "expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities". The Commissioner contended that all of the disputed expenditure was feedstock expenditure.

The Tribunal held that the feedstock expenditure exclusion only applies to expenditure on such goods or materials as are acquired or produced in order that they will be subjected to processing or transformation in the research and development activity. Contrary to the Commissioner's arguments, the exclusion does not extend to what a company spends to subject those goods or materials to processing or transformation.

The Tribunal found that the company's feedstock expenditure consisted only of the following types of expenditure: expenditure incurred in acquiring or producing ores for the plant trials in its concentrator plants; expenditure incurred in acquiring or producing copper concentrate to be fed into the company's Mt Isa smelter process for the plant trials; and expenditure incurred on the oxygen inserted into the smelter process. None of the other disputed expenditure items was feedstock expenditure and could therefore be deducted at the premium rate.

In relation to the overlap issue, the evidence was that, when the company's research and development activities were being undertaken concurrently in the Mt Isa copper concentrator and smelter, all of the concentrate produced was sent to the smelter. The Tribunal considered whether the definition of feedstock expenditure could be interpreted so as to exclude expenditure incurred in producing products in other research and development activities but held that the statutory language was clear. The Tribunal found that the expenditure incurred in producing copper concentrates to be used in the smelter plant trials was feedstock expenditure.

The Tribunal varied the Commissioner's decisions, allowing the company to claim deductions at the premium rate for some of the expenditure incurred during the plant trials. It also varied the amounts of shortfall interest charge imposed on the company.

Veterans' Affairs

Hoang and Repatriation Commission

[2015] AATA 470; 30 June 2015
Deputy President James Constance

Whether the applicant is entitled to benefits under the Veterans' Entitlements Act 1986 as a result of service with the South Vietnam Air Force

Mr Hoang claimed he was a member of the South Vietnam Air Force during the Vietnam War. In 2013, Mr Hoang applied to the Repatriation Commission to have his service recognised as qualifying service for the purposes of the *Veterans' Entitlements Act 1986* (the Act) on the basis that he was an allied veteran. The Commission decided that he did not render qualifying service. Mr Hoang applied to the Tribunal for review of the Commission's decision.

There were three issues for the Tribunal to determine:

- whether Mr Hoang enlisted as a member of the South Vietnam Air Force and rendered continuous full-time service during the relevant period of hostilities (31 July 1962 to 11 January 1973)
- whether he incurred danger from hostile forces of the enemy during that service, and
- if so, whether the service was rendered in connection with a war in which the Naval, Military or Air Forces of Australia were engaged.

In relation to his enlistment and period of service, the Tribunal considered evidence from Mr Hoang and from two other men who said they first met him in 1972. The Tribunal also took into account a photograph of Mr Hoang wearing the uniform of the South Vietnam Air Force cadets and a German travel document issued to him in 1982 which noted his occupation as a pilot. While there were some inconsistencies in Mr Hoang's evidence as to when he joined the Air

Force, the Tribunal was satisfied that he had enlisted as a trainee helicopter pilot sometime in 1972 and continued as a member of the Air Force until the fall of Saigon.

Mr Hoang gave evidence that he had been present during Vietcong attacks on two different Air Force bases in 1972. He claimed that, in both attacks, rockets had exploded close to him. While there were discrepancies in his evidence, the Tribunal was satisfied Mr Hoang was an honest witness and it took into account the effects of the passage of time on his memory in accordance with section 119 of the Act. The Tribunal was satisfied that the first attack had occurred in 1972, that Mr Hoang was exposed to the risk of death or injury and therefore incurred danger from hostile forces. The Tribunal was also satisfied that Mr Hoang's service was rendered in connection with a war in which Australian forces were engaged.

The Tribunal set aside the decision of the Commission and substituted it with a decision that Mr Hoang had rendered qualifying service within the meaning of the Act.

Workers' Compensation

Ripper and Australian Postal Corporation

[2015] AATA 15; 14 January 2015
Senior Member Graham Friedman

Whether a return to work program was a suitable rehabilitation program – whether the applicant refused or failed to undertake the rehabilitation program

Ms Ripper suffered an injury to her left knee in a work-related motor vehicle accident in 2001. The Australian Postal Corporation (Australia Post) accepted liability to pay compensation in respect of the injury under the *Safety, Rehabilitation and Compensation Act 1988* (the Act). Aggravations to the injury caused her to reduce her working hours from 2008.

In September 2011, Australia Post met with Ms Ripper and Ms Ripper's general practitioner to discuss a return to work program. Ms Ripper was subsequently referred for a rehabilitation pain management assessment which led to her participation in a pain management program. Ms Ripper's doctor certified that Ms Ripper could only work 1.5 hours per day. However, the multidisciplinary rehabilitation pain management team concluded she had a work capacity of two hours per day.

In June 2012, Australia Post determined that Ms Ripper should commence a rehabilitation upgrade program starting with two hours' work one day a week and increasing the number of hours and days over time. Ms Ripper commenced the program but managed to work only 1.5 hours per day. In July 2012, Ms Ripper's compensation payments were suspended on the basis that she had failed to undertake or continue to participate in the program. Ms Ripper requested reconsideration of the decision that she undertake the rehabilitation program and the decision to suspend her compensation payments. Both decisions were affirmed and she applied to the Tribunal for review.

The issues before the Tribunal were:

- whether the rehabilitation program was valid and, if so, whether it was suitable; and
- whether Ms Ripper had failed to undertake the program and, if so, without reasonable excuse.

It was argued for Ms Ripper that the program was invalid because Australia Post had failed to have regard to two matters as required by section 37(3) of the Act. Firstly, it was contended that Australia Post had failed to have regard to her attitude to the program. While the Tribunal noted that communication with Ms Ripper was not optimal, it found Australia Post did have regard to her attitude to the program. Secondly, it was submitted that Australia Post had failed

to consult Ms Ripper and her doctor in developing the program in accordance with Comcare's *Guidelines for Rehabilitation Authorities 2005*. However, the Tribunal found that Australia Post did consult Ms Ripper and made reasonable attempts to consult the doctor, including by sending her the proposed program and attempting to contact her on two occasions.

In considering whether the rehabilitation program was suitable, the Tribunal took into account a range of matters, including that there was only a 30 minute difference between the view of Ms Ripper's doctor and the multidisciplinary team as to her capacity and that the program provided for ongoing reviews as to her fitness for work. The Tribunal found that the program was flexible enough to accommodate Ms Ripper's situation and was a suitable program.

The Tribunal held that, for the purposes of the Act, the requirement to undertake a rehabilitation program means more than to begin or to commence the program, but less than completing it. It is synonymous with "to participate in" or "to engage in" and by inference requires a real or genuine level of commitment. The Tribunal found that Ms Ripper made a genuine and reasonable effort within her physical capability to fulfil her obligations under the program. She complied substantially with the program and, as a result, did not fail to undertake the program.

The Tribunal affirmed the decision that she should undertake the rehabilitation program but set aside the decision to suspend her compensation payments.