

Appendix 6: Decisions of interest

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

Compensation

Re Liu and Comcare

[2004] AATA 617, 18 June 2004 – President Justice G Downes, Deputy President RP Handley, Mr MD Allen, Senior Member

This case concerned future liability for compensation for injured Commonwealth government employees under the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). In particular, the Tribunal considered whether liability for compensation for an accepted injury can come to an end.

One desirable outcome of compensation claims before the Tribunal is that the parties reach an agreement on the result. In these cases, consent orders are drafted by the parties and provided to the Tribunal. If a decision in or consistent with the terms of agreement is within the powers of the Tribunal and it appears appropriate for the Tribunal to make such a decision, the Tribunal then formalises the parties' agreement by publishing a decision in accordance with the agreement.

Some draft consent orders in compensation matters have included provisions which purported to limit the future liability for compensation for the injured employee. The Tribunal was concerned that these provisions did not accurately reflect the law and it therefore decided to address this issue and offer guidance to parties as to appropriate terms to be included in consent orders.

As set out by the Tribunal in its decision, section 14 of the SRC Act creates a general liability for the payment of compensation to injured workers covered by the Act. That section does not address

the nature or the amount of the compensation, which is left to other sections of the SRC Act. A determination of entitlement to compensation therefore normally incorporates a finding in favour of the injured employee under both section 14 and one of the other sections of the Act, such as section 16 (which provides for compensation for medical expenses), section 19 (which provides for compensation for injuries resulting in incapacity) or section 24 (which provides for compensation for injuries resulting in permanent impairment).

A compensable injury may not always result in the payment of compensation. The employee may be entitled to intermittent compensation and there may be periods when there is no entitlement to compensation. However, during such periods an injury that has been accepted as compensable under section 14 will not cease to be a compensable injury. Instead it is correct to say during some periods that at the present time the compensable injury does not give rise to an entitlement to compensation. It is possible that the compensable injury may never give rise to future entitlement to compensation, but this cannot be known or determined in advance. As was set out in the Federal Court decision of *Plumb v Comcare* (1992) 39 FCR 236, no determination (even if made with the consent of the parties) can preclude an employee from making a future claim for compensation in relation to a compensable injury that has been determined to exist under section 14.

Referring to the case of *Australian Postal Corporation v Oudyn* (2003) 73 ALD 659, the Tribunal distinguished between the discharge of the liability to pay compensation under sections other than section 14, which can be discharged from time to time when all entitlements for payment of past compensation have been satisfied and there is no continuing liability, and liability under section 14 itself. Liability under section 14 is the primary determination of the existence of a compensable injury which is necessary,

but not sufficient, for the payment of compensation. Before compensation is payable, an additional finding of liability to pay compensation must be made and it is that liability to pay compensation alone which can, at a point in time, but not prospectively, be discharged and terminated. It was for this reason that the Federal Court in *Rosillo v Telstra Corporation Limited* [2003] FCA 1628 set aside a decision of the Tribunal that affirmed a determination:

That on the basis that your condition has now resolved, [the respondent] is not liable to pay compensation in respect of your injury to "strain lower lumbar region" on and from 28 August 2001.

That determination purported to speak in the future. This was also the case with some determinations in the original draft consent orders that were the subject of this case. Prior to the hearing, however, Comcare provided the Tribunal with proposed amended terms of agreement. The Tribunal considered the amended terms in the light of three criteria which the Tribunal found should be satisfied in order for the Tribunal to approve terms of agreement. These criteria are that determinations:

- (a) should not suggest that liability has ceased
- (b) should not suggest that no future liability can exist
- (c) should speak only as to present liability.

The Tribunal found that the amended terms satisfied each of the criteria. The statements as to cessation of liability and those suggesting that there was no future liability had been deleted and the terms made it clear that they spoke only to the present date. The Tribunal therefore found that decisions in accordance with the amended terms of agreement were both within the powers of the Tribunal and were appropriate to be made.

Practice and procedure

Re Rich and Australian Securities and Investments Commission

[2003] AATA 1009, 24 September 2003; [2003] AATA 1044, 13 October 2003; [2003] AATA 1339, 23 December 2003 – President Justice G Downes

In a series of decisions relating to a single matter, the Tribunal explored various issues, including the means by which a prospective applicant for review of a decision can obtain material relating to that decision, the Tribunal's jurisdiction to review decisions and the Tribunal's power to issue summonses.

The applicant, Mr Rich, made a complaint pursuant to section 536 of the *Corporations Act 2001* (the Corporations Act) to the Australian Securities and Investments Commission (ASIC) about the conduct of the liquidator of One. Tel Limited. This section allows ASIC to make inquiries into the conduct of a liquidator in certain circumstances, including if a complaint is made, but any action as a result is taken by the Federal Court, not ASIC.

After some initial consideration and correspondence, ASIC declined to proceed further. The applicant then sought a statement of reasons for the decision not to investigate further. ASIC refused to provide this, asserting that the power to make that decision came from its general powers under the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) rather than the Corporations Act, and was therefore not reviewable by the AAT. Therefore, reasons were not required to be provided under the AAT Act.

The application to the Tribunal was for a decision under section 28(1AC) of the AAT Act as to whether the applicant was entitled to a statement of reasons. There was no application for review of the alleged substantive decision.

The applicant sought issue of a summons requiring ASIC to produce documents associated with its conduct in connection with the initial complaint. In its first decision, the Tribunal granted leave for the issue of the summons. It held that the applicant was entitled to at least seek to prove that ASIC's conduct included making a reviewable decision under section 536. The documents that came into existence within ASIC in connection with its inquiries would at least in part determine whether a decision had been made.

ASIC answered the summons but objected to their production to the applicant, on the grounds that the application for a statement of reasons would inevitably fail and the documents would effectively grant the applicant reasons he was not entitled to obtain. ASIC argued that section 536 only set out one of its functions, and that power to perform those functions was conferred by the ASIC Act. Therefore, there would never be any decision under section 536 capable of review.

After considering relevant authorities and the terms of the section, the Tribunal rejected this argument. Section 536 did not merely identify ASIC's inquiry function, it also conferred the power to make those inquiries. The documents produced under summons were therefore capable of revealing that a reviewable decision had been made, and the applicant's case was therefore not hopeless.

In its third decision the Tribunal examined the correspondence between the applicant and ASIC, and other documents that showed ASIC had earlier investigated its own separate concerns about the liquidation of One.Tel and received assurances from the liquidators. The Tribunal held that on receipt of the applicant's complaint ASIC had in effect re-examined its own inquiries and had concluded that it remained satisfied with the results of those inquiries. This constituted a new decision under section 536 to not inquire further. The applicant was therefore entitled to a statement of reasons for this decision.

Social Security

Re Peura and Secretary, Department of Family and Community Services

[2003] AATA 1123, 7 November 2003 –
Deputy President DG Jarvis

In this case, the Tribunal set aside the decision under review and substituted a decision that arrears of age pension and wife pension be paid to the applicants for a particular period. The central issue in this case was whether the applicants were provided with notice of a decision to attribute income and assets of a family trust to them.

The applicants, Mr and Mrs Peura, were recipients of an age pension and a wife pension. One of the applicants was advised by a letter in November 2001 that, with the introduction of new private trust and private company attribution rules, Centrelink would attribute the income and assets of a family trust to the applicants from 1 January 2002. This letter also stated that:

You and/or your partner will be advised of this decision in December 2001 and its effect on entitlements.

The same applicant had also received a letter in February 2001 advising her of the proposed new rules and asking her to supply information about the family trust.

Both applicants received a letter dated 10 December 2001 that purported to advise them of a decision. While the letters contained details of the amounts of payment that would be made, they made no reference to the previous correspondence and did not indicate that the change in payment was due to the application of the new rules. One of the applicants gave evidence that she regularly received letters making small adjustments in the rate of pension without explanation, which were virtually indistinguishable from the letters of 10 December 2001.

The applicants advised Centrelink in May 2002 that the trust had been inactive since June 2001. As a result, Centrelink decided to cease attributing the income and asset of the trust to the applicants. However, it refused to pay arrears of the pensions for the period January–May 2002 on the grounds that the applicants had failed to seek review of the December 2001 decision within the statutory period of 13 weeks after notice had been given as provided in section 109 of the *Social Security Administration Act 1999*.

After reviewing a number of authorities, the Tribunal decided that the correct approach in deciding whether the letters constituted notice of the relevant decision could be summarised as follows:

- The Tribunal should identify the decision of which notice was to be given.
- The subject letters should be construed objectively.
- The letters should be intelligible; that is, they should inform the recipient of the making of the decision and the content of it.
- Where the rate of pension changed as a result of changed circumstances or the manner in which those circumstances were assessed, merely advising the recipient of the rate of his or her pension only constituted advice of the effect of the decision.
- The letters need not advise the reasons for the decision.

The Tribunal concluded that the letters of 10 December 2001 only constituted advice of the effect of the decision upon the applicants' rates of pension. They failed to advise what the relevant decision was (that is, that the rates of payment had been varied as a result of the application of the new income attribution rules) and so were not intelligible in that they did not constitute notice of the relevant decisions within the meaning of the section imposing the statutory period of

13 weeks. This was despite previous correspondence making clear that advice of both the decision and its impact could be expected. The letters of 10 December 2001 should not be interpreted by reference to the earlier correspondence as they made no reference to that earlier correspondence.

The Tribunal held that, as no notice had been given, arrears should be paid to the applicants for the period in contention.

Re Torv, Bond University Limited and Secretary, Department of Family and Community Services

[2004] AATA 182, 24 February 2004 –

Mr O Rinaudo, Member

This case considered whether the 'reduced fees' scholarship received by the applicant, Mr Torv, was to be treated as income within the meaning of section 8 of the *Social Security Act 1991* with the consequence that he was not entitled to receive Youth Allowance.

Mr Torv was offered a half scholarship to Bond University to undertake studies in law. The scholarship was structured so as to reduce the fees payable by Mr Torv. He did not receive any of the scholarship money in his hand.

Centrelink assessed the scholarship as income pursuant to section 8 of the *Social Security Act*. This meant that Mr Torv was not entitled to receive Youth Allowance as his income exceeded the threshold for eligibility. Centrelink argued before the Tribunal that the scholarship came within the Act's definition of income because it was valuable consideration; Mr Torv had the benefit of paying only half the normal tuition fee.

The Tribunal rejected this approach. Neither Bond University nor the student received any money as a result of the scholarship. The fees were simply not payable. What other students might pay for the same degree was not relevant to the question of whether Mr Torv was receiving income.

In the Tribunal's view, there was a significant difference between a scholarship drawing monies out of a trust fund to pay tuition fees and a scholarship where the fees were never payable. A scholarship in the latter category, as in the present case, would not constitute income.

Immigration

Re Stafford and Minister for Immigration and Multicultural and Indigenous Affairs

[2003] AATA 1165, 19 November 2003 – Deputy President D Muller

This case concerned an application by Mr Stafford to review a decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs to reject an application for a tourist visa made by his son on the basis that his son had a substantial criminal record and did not pass the character test pursuant to section 501(6) of the *Migration Act 1958*.

Mr Stafford's son, Stuart Stafford, applied for a tourist visa in October 2002 for the purpose of travelling with his wife and son to Australia for approximately three weeks to visit Mr Stafford. Stuart Stafford gave evidence that he had not seen his father since he was seven years old, having lost contact with him after his father moved to Australia in 1970. Stuart stated that he had recently traced his father and re-established contact with him and that he wished to visit Australia to meet his father and to introduce him to his wife and son. However, in January 2003 Stuart Stafford's application for a tourist visa was refused on the ground that he did not pass the character test. Mr Stafford sought review of that decision.

The issue before the Tribunal was whether Stuart Stafford passed the character test in section 501(6) of the *Migration Act* and, if he did not pass the test, whether the discretion available in section 501(1) of the Act not to refuse the visa should be exercised in his favour.

The Minister argued before the Tribunal that Stuart Stafford had a criminal history that extended from 1974, when he was 12 years old, until 1997, when he was 35. The Minister submitted that Stuart Stafford posed a threat to the Australian community and that he may re-offend while visiting Australia.

The Tribunal found that Stuart Stafford did not pass the character test in section 501 of the Act. However, the Tribunal held that there were significant compassionate grounds for the discretion to be exercised favourably to allow a father and son to reunite after 32 years.

Additionally, the Tribunal found that there were a number of other significant reasons to exercise the discretion not to refuse the tourist visa. The Tribunal found that the visa that Stuart Stafford sought was for a short holiday and that as he has a business, a home and the rest of his family in the United Kingdom he was unlikely to overstay his visa. The Tribunal noted that Stuart Stafford seemed to have rehabilitated himself, which was evidenced by his having purchased a house with his wife, established a successful construction business, ceased associating with people with criminal backgrounds and taken up the sport of scuba diving. Similarly, Stuart Stafford had not been convicted of any criminal offence for the previous six years. The Tribunal also noted that in the previous three years Stuart Stafford had travelled widely to other countries, including the United States, Egypt, France, Spain, Germany and Cyprus, with no apparent problems. Finally, the Tribunal noted that although Stuart Stafford's criminal history was extensive, it did not contain any convictions for violence or drug-related offences.

The Tribunal concluded that it was unlikely that Stuart Stafford posed any threat to the Australian community and it was unlikely that he would re-offend during a short holiday in Australia. The Tribunal therefore set aside the decision of the Minister and remitted the matter with the direction that the application by Stuart Stafford for a tourist visa should not be refused pursuant to section 501(1) of the Act.

Taxation

Re QT2001/442–444 and Commissioner of Taxation

[2004] AATA 349, 5 April 2004 – Senior Member KL Beddoe

This case concerned an application for review of objection decisions by the Commissioner of Taxation (the Commissioner) in relation to the years of income ended 30 June 1996, 30 June 1997 and 30 June 1998. The issue before the Tribunal was whether pilotage and other fees derived from third parties were assessable income of the applicant or of a company of which the applicant was the controlling mind.

In particular, the Tribunal was required to consider whether the arrangements entered into by the applicant were a sham, whether the applicant and the company entered into or carried out a scheme to obtain a tax benefit as referred to in section 177D of the *Income Tax Assessment Act 1936* (the 1936 Act), whether the Commissioner's determination in terms of section 177F of the 1936 Act was effective to include the tax benefit in the applicant's assessable income or whether income arising from the personal exertion of the applicant as a marine pilot and ship's master was assessable income of the applicant and not the company and, finally, whether the assessed penalty by way of additional tax should be remitted in full or in part.

The applicant was an experienced ship's master. In 1993 he was approached by the Queensland Coast and Torres Strait Pilots' Association (which provided marine pilots for safe navigation of ships in the waters of the Queensland coast, Torres Strait and New Guinea) to join the Association. In June of that year the applicant obtained a Queensland Coastal Pilot licence to act as a Queensland Coastal Pilot for ships on the Queensland coast and Torres Strait.

The applicant was concerned about the limitation of protection of a pilot's legal liability in the event of accidents, particularly when outside Queensland coastal waters. The Association advised him that his interest in the Association should be owned by a company to limit any liability to claims for damages. Relying on this informal advice, as well as the advice of other pilots, in June 1993 the applicant arranged for his company to be incorporated in order to limit his liability for damages and to provide superannuation benefits. The company also purchased a share in the Association and entered into an arrangement with the Association to provide the applicant's services as a pilot to perform such pilotage contracts as may be allocated to the applicant by the Association acting as the agent of the applicant. Initially there was an informal arrangement between the applicant and the Association whereby the company was assigned pilotage work to be performed by the applicant, but from late 1995 the arrangement was formalised in the form of a written contract between the company and Queensland Coastal Pilot Service Pty Ltd. The written contract, however, included various provisions which were based on the defined, but incorrect, supposition that the company was a licensed marine pilot.

The applicant commenced work as a pilot in August 1993 after the company had commenced to carry on business. The applicant and his then wife were the sole shareholders, directors and employees of the company. The applicant performed the pilot duties for which the company had entered into agreement with the Association. From time to time, the applicant also undertook work as a ship's master and other work on behalf of the company, which treated the fees derived as part of its assessable income. The company conducted its own bank account and payments received in respect of work actually performed for the company by the applicant were deposited into the company's bank account. The company paid annual 'salaries' to the applicant and his wife on a distribution basis.

The Tribunal accepted that the applicant established the company for the purpose of carrying on the business of marine pilot because, on the basis of informal advice, he believed that he needed to protect his personal liability. The Tribunal observed that the situation may have been different if the applicant and the company had had professional advice, but it did not accept that the documents in relation to the company were not intended to have legal effect. The Tribunal found that the arrangements in relation to the company were not based on sham documents. Despite their limitations, the documents were intended to have effect and, in particular, it was intended that the company carry on a business of supplying the services of a licensed marine pilot as arranged by the Association. The Tribunal was also satisfied that there was no intention to represent the company as a licensed marine pilot and the relevant parties understood the company to not be so licensed and that it was the applicant who performed the work as marine pilot and ship's master, for which he was appropriately licensed.

The Tribunal found that, during the relevant years of income, the applicant and the company conducted their affairs on the basis that it was the company that had contracted to supply marine pilot services and that that was also the understanding of the Association. The assessable income was therefore derived by the company because it had contracted to supply the service and the income was derived when that service was provided. The Tribunal did find, however, that the interposition of the company between the applicant and the Association was an arrangement within the definition of 'scheme' and that in each relevant year of income the applicant obtained a tax benefit due to that scheme. This was because the fees included in the company's assessable income would have been included in the applicant's assessable income if he had not entered into the arrangement to interpose the company. The Tribunal decided that there was no basis for interfering with the Commissioner's compensating adjustments and it was not satisfied that the relevant assessments were excessive. The Tribunal therefore affirmed the objection decisions as to assessment of taxable income.

Finally, the Commissioner argued that section 226H of the 1936 Act applied to the applicant. That section provides for penalty tax to apply where a taxpayer's tax shortfall is due to his or her recklessness. Based on the interpretation of 'recklessness' by the Federal Court in *BRK (Bris) Pty Ltd v Federal Commissioner of Taxation* [2001] ATC 4111, the Tribunal found that the applicant had not been reckless. This was because the applicant had entered into the arrangement based on the belief that it was the normal practice for pilots to interpose a company between themselves as individuals and their customers. The Tribunal therefore remitted the penalty assessed by the Commissioner.

Veterans' Affairs

Re Butler and Repatriation Commission

[2003] AATA 789, 12 August 2003 – Mr J Handley, Senior Member

This case concerned the Special Rate pension that is payable to war veterans pursuant to section 24 of the *Veterans' Entitlements Act 1986* (the VE Act). The matter is unusual because it illustrates that, in certain circumstances, a veteran may qualify for the Special Rate even though factors exist that can often prevent a veteran from qualifying.

Mr Butler, a Vietnam veteran with the accepted war-caused disabilities of tinnitus and post-traumatic stress disorder (PTSD), applied to the Repatriation Commission (the Commission) for pension at the Special Rate. The Commission instead increased Mr Butler's pension to 80 per cent of the general rate and the Veterans' Review Board subsequently affirmed that decision. Mr Butler applied to the Tribunal for review of the decision.

The main issue before the Tribunal was whether Mr Butler satisfied the provisions of paragraphs 24(1)(c) and 24(2)(a) of the VE Act. These provisions require that, to be eligible for pension at the Special Rate, a veteran must be prevented by his or her war-caused injury or war-caused disease alone from continuing to undertake remunerative work that he or she was undertaking, and consequently suffer a loss of salary or wages.

After leaving school, Mr Butler worked as a butcher and slaughterman until he enlisted. During service, he was trained as a transport driver and after discharge he resumed working at the abattoir and then later worked as a transport driver and a builder's labourer. In 1980, he commenced work with Alcoa as a forklift driver/machine operator, but in about 1982 or 1983 he injured his back at work. He received weekly compensation until 1985 when he took a voluntary redundancy package and he

received a lump sum payment in respect of his injury. Some time after leaving Alcoa, Mr Butler moved from Geelong to Nathalia, a remote country area in northern Victoria, largely because of the climate which gave him relief from the symptoms of prickly heat rash which he has suffered since Vietnam.

Mr Butler had not been employed since he left Alcoa, nearly 20 years previously. After ceasing work with Alcoa, Mr Butler was entitled to a disability support pension, and from 1995 service pension was paid from the Department of Veterans' Affairs by reason of permanent unemployability. However, by the late 1980s Mr Butler's back symptoms had improved and he began to seek employment. He applied for employment as a transport driver but was not successful.

From the late 1980s, Mr Butler's PTSD symptoms gradually worsened, and in 1992 or 1993 he was diagnosed with the condition. In about 1994, Mr Butler suffered acute symptoms of PTSD after using sandbags to save his home from local floods. Working with the sandbags, combined with the presence of an overhead helicopter performing rescue operations, reminded Mr Butler of his experiences in Vietnam. From that time, Mr Butler was treated by a psychologist and later by a psychiatrist.

In 2000 or 2001 Mr Butler applied for employment with a local supermarket and local trucking companies. In each case Mr Butler was not offered employment because of his PTSD. This was confirmed by the proprietor of the supermarket, who gave evidence that he would have employed Mr Butler if he had not had PTSD and that, although he would be wary of employing a person with a prior back injury, he would consider employing such a person if they had recovered from that injury.

The Commission argued that Mr Butler did not satisfy the 'alone' test under section 24 because he left the workforce because of a back injury, and the combined effects of his age, period of time out of the workforce, intention to retire on a disability pension and lack of recent work experience made him unemployable. That is, Mr Butler's war-caused PTSD alone was not responsible for his incapacity to work.

The Tribunal observed that Mr Butler's application was unusual because he conceded that his incapacity commenced initially by an injury which arose out of employment. However, Mr Butler gave evidence that he later recovered from that injury and his capacity for employment was regained, but shortly after that time his war-caused PTSD became apparent. It was this war-caused PTSD alone that Mr Butler stated affected his capacity for work and this meant that he was therefore able to satisfy the provisions of section 24.

The Tribunal accepted Mr Butler's evidence. It found that Mr Butler initially left the workforce because of his back injury (which was not war-caused) and that there was a long period of incapacity after that injury during which time he was away from the workforce. However, by 1990 the effects of the work-related back injury had ceased and at that time there was no prohibition on Mr Butler seeking employment. Indeed, at that time there were work opportunities in the Nathalia area for which Mr Butler applied. The Tribunal found that the fact that Mr Butler applied for these positions before he claimed a service pension and he later applied for employment in 2000 or 2001 was inconsistent with someone who regarded himself as being retired or unable to work. Similarly, the Tribunal rejected the argument that Mr Butler could not obtain work due to a lack of recent work experience as there was no evidence that time out of the workforce had any bearing on his unsuccessful job applications.

The Tribunal therefore found that Mr Butler would have been capable of undertaking employment if it were not for his incapacity from war-caused injury and by reason of that incapacity he was prevented from continuing to undertake the remunerative work that he was undertaking and that he suffered a loss of salary or wages. The Tribunal set aside the decision of the Commission and in substitution decided that Mr Butler was entitled to the Special Rate pension.