Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2016] AATA 971

Division:	**TAXATION AND COMMERCIAL DIVISION**
File Number:	**2015/6427**
Re:	**WTPG**
	APPLICANT
And:	**COMMISSIONER OF TAXATION**
	RESPONDENT

DECISION

Tribunal	**Deputy President S A Forgie**
Date	**30 November 2016**
Place	**Melbourne**

The Tribunal decides to:

affirm the reviewable objection decision of the respondent dated 9 November 2015.

[sgd]
Deputy President

CATCHWORDS

TAXATION – income tax – deductions – expenses incurred when applicant's wife accompanied him on work-related travel as personal carer – whether expenses deductible – expenses not incurred in course of gaining or producing applicant's assessable income – expenses a loss or outgoing of private or domestic nature – decision not made in breach of *Disability Discrimination Act 1992* – decision affirmed.

DISCRIMINATION – effect of *Disability Discrimination Act 1992* on *Income Tax Assessment Act 1997* – no inconsistency between the two regarding expenses – Commissioner not in breach of obligation under s 29 of the *Disability Discrimination Act 1992.*

WORDS AND PHRASES – "discrimination"

LEGISLATION

Administrative Appeals Tribunal Act 1975; s 43
Civil Aviation Act 1988; s 98(6B)
Disability Discrimination Act 1992; ss 3, 4(1), 5, 6, 29, 47, 47(1), 47(1)(b), 47(1)(c), 47(1)(d), 47(2), 47(3), 47(4), 47(5)
Disability Discrimination and Other Human Rights Legislation Amendment Act 2009; Item 3 of s 2(1), s 3, Item 72 of Sch 2
Disability Discrimination Regulations 1996; Sch 1
Equal Opportunity Act 2010 (Vic); ss 50, 50(1), 50(3)
Income Tax Assessment Act 1936; s 51(1)
Income Tax Assessment Act 1997; ss 4-15, 8-1, 8-1(1), 8-1(2), 8-1(2)(b), 8-1(2)(d), 26-1, 26-30, 26-30(1), 26-30(2), 995-1(1)
Racial Discrimination Act 1975; s 10
Tax Law Improvement Act 1997
Taxation Administration Act 1953; Div 359 of Sch 1

Explanatory Memorandum to the *Disability Discrimination Bill 1992*
Explanatory Memorandum to the *Tax Law Improvement Bill 1996*

CASES

Abbott v Transport Accident Commission [1991] VicRp 51; [1991] 2 VR 116
Certain Lloyd's Underwriters v Cross [2012] HCA 56; (2012) 248 CLR 378; 293 ALR 412; 87 ALJR 131
Commissioner of Taxation v Cooper (1991) 29 FCR 177; 99 ALR 703; 91 ATC 4396; 21 ATR 1616
Commissioner of Taxation v Finn [1961] HCA 61; (1961) 106 CLR 60
Commissioner of Taxation v McMahon and Anor [1997] FCA 1087; (1997) 79 FCR 127; 149 ALR 159; 37 ATR 167
Commissioner of Taxation v Payne [2001] HCA 3; (2001) 202 CLR 93; 177 ALR 270; (2001) 75 ALJR 442; 46 ATR 228; 2001 ATC 4027
Federal Commissioner of Taxation v Anstis [2010] HCA 40; (2010) 241 CLR 443; 272 ALR 1; 76 ATR 735; 85 ALJR 122; 2010 ATC ¶20-221
Federal Commissioner of Taxation v Maddalena (1971) 2 ATR 541; 45 ALJR 426; 71 ATC 4161
Fortescue Metals Group Limited v The Commonwealth of Australia [2013] HCA 34; (2013) 250 CLR 548; 300 ALR 26; 87 ALJR 935; 89 ATR 1
Lodge v Commissioner of Taxation [1972] HCA 49; (1972) 128 CLR 171; 3 ATR 254; 46 ALJR 575; 72 ATC 4174
Lunney v Federal Commissioner of Taxation [1958] HCA 5; (1958) 100 CLR 478
Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355; 72 ALJR 841; 153 ALR 490
Purvis v New South Wales [2003] HCA 62; (2003) 217 CLR 92; 202 ALR 133; 78 ALJR 1; 77 ALD 570
Re Frisch and Federal Commissioner of Taxation [2008] AATA 462; (2008) 72 ATR 551; 2008 ATC ¶10-031
Re Gilbert and Federal Commissioner of Taxation (1982) 82 ATC 141
Saraswati v The Queen [1991] HCA 21; (1991) 172 CLR 1; 100 ALR 193; 65 ALJR 402

OTHER MATERIALS

Productivity Commission, "*Review of the Disability Discrimination Act 1992*" (Report No. 30), 30 April 2004; sections 9.1, 9.5

REASONS FOR DECISION

1. During the income year ending 30 June 2014 (2014 year), WTPG paid for his wife to travel with him to London so that she could be his personal carer while he attended two work-related conferences. When he lodged his return on 18 December 2014 for the 2014 year, WTPG claimed his wife's airfares, amounting to $9,767.52 (Travel Expense), as a deduction. The Commissioner of Taxation (Commissioner) disallowed his claim for those expenses and, on 7 January 2015, issued a notice of assessment to WTPG for the 2014 year. On 9 June 2015, WTPG applied for a private ruling on whether the Travel Expenses were deductible for the 2014 year. The Commissioner made a private ruling on 29 June 2015 ruling that the Travel Expenses were not deductible. When WTPG objected to the private ruling, the Commissioner disallowed it in full on 9 November 2015 (objection decision). WTPG has applied for review of that objection decision primarily on the ground that it constitutes discrimination under the *Disability Discrimination Act 1992* (DDA). I have decided to affirm the Commissioner's objection decision.

THE ISSUES

2. The following issues are raised by this application:

    (1) Are the Travel Expenses deductible in the 2014 year under s 8-1 of ITAA97?

        (a) Were the Travel Expenses incurred in gaining or producing WTPG's assessable income under s 8-1 of ITAA97?

        (b) Were the Travel Expenses a loss or outgoing of a private or domestic nature so that they may not be deducted as a result of the application of s 8-1(2)(b) of ITAA97?

    (2) Does s 26-30 of ITAA97 operate to deny WTPG a deduction for Travel Expenses in the 2014 year?

BACKGROUND

3. I cannot go beyond the facts on which the Commissioner made his private ruling. They are these.[1] In or about May 2013, WTPG was invited to attend and speak at a conference related to the duties of his employment in Victoria. The conference was to be held in the United Kingdom. His employer approved his attending the conference in an official capacity as well as a second conference to be held in the United Kingdom. WTPG's

[1] *Commissioner of Taxation v McMahon and Anor* [1997] FCA 1087; (1997) 79 FCR 127; 149 ALR 159; 37 ATR 167; Lockhart, Beaumont and Emmett JJ

airfares were reimbursed by his employer. The conference organisers paid for the expenses of the accommodation for WTPG and his wife as well as other out-of-pocket expenses.

4. WTPG suffers from medical conditions that mean that he is unable to walk any distance without assistance and cannot stand for any length of time. As a consequence, he needs a carer not only to assist him with standing and walking but to use the toilet, shower and bathe and dress. WTPG's employer was aware of his disabilities but did not provide him with a carer or assistant to travel with him. None of the employer's other staff members were willing to accompany him to act as his carer.

5. WTPG's wife acted as his carer both on the flights to and from the United Kingdom and during his time in that country. During that time, she helped him to dress, assisted him with his personal hygiene, showering and toilet needs and supported him when he was walking and standing. Her assistance was necessary to enable WTPG to travel to, and attend, both conferences. In addition to his attendance at the two conferences, WTPG attended a series of meetings related to the duties of his employment during his time in the United Kingdom between 23 September 2013 and 4 October 2013. WTPG's wife did not perform any tasks relating to the duties he performed in the course of employment. She was not employed by WTPG's employer and did not receive any payment for the assistance that she gave him.

6. In response to WTPG's request for a private ruling, the Commissioner ruled on 29 June 2015 that:

    (1) the Travel Expense was not deductible pursuant to s 8-1(2)(b) of the *Income Tax Assessment Act 1997* (ITAA97) as it was of a private or domestic nature; and

    (2) a deduction for the Travel Expense was, in any case, denied under s 26-30 of ITAA97.

LEGISLATIVE BACKGROUND

Relevant provisions of ITAA97

7. A person's taxable income is worked out by subtracting the amount of any deductions from the amount of his or her assessable income. If the deductions equal or exceed the assessable income, the person does not have a taxable income.[2] Section 8-1 provides for what it describes as "*general deductions*". For the purposes of this case, only ss 8-1(1) and (2) are relevant. They provide:

[2] ITAA97; s 4-15

"*(1) You can* **deduct** *from your assessable income any loss or outgoing to the extent that:*

(a) it is incurred in gaining or producing your assessable income; or

(b) it is necessarily incurred in carrying on a business for the purpose of gaining or producing your assessable income.

Note: Division 35 prevents losses from non-commercial business activities that may contribute to a tax loss being offset against other assessable income.

(2) However, you cannot deduct a loss or outgoing under this section to the extent that

(a) it is a loss or outgoing of capital, or of a capital nature; or

(b) it is a loss or outgoing of a private or domestic nature; or

*(c) it is incurred in relation to gaining or producing your *exempt income or your *non-assessable non-exempt income; or*

(d) a provision of this Act prevents you from deducting it.

For a summary list of provisions about deductions, see section 12-5."

8. Section 26-30 is a provision of the sort contemplated by s 8-1(2)(d). Only ss 26-30(1) and (2) are relevant:

"*(1) You cannot deduct under this Act a loss or outgoing you incur, insofar as it is attributable to your *relative's travel, if:*

*(a) you travelled in the course of performing your duties as an employee, or in the course of carrying on a *business for the purpose of gaining or producing your assessable income; and*

(b) your relative accompanied while you travelled.

(2) Subsection (1) does not stop you deducting a loss or outgoing if:

*(a) your *relative, while accompanying you, performed substantial duties as your employer's employee, or as your employee; and*

(b) it is reasonable to conclude that your relative would still have accompanied you even if he or she had not had a personal relationship with you."

9. Among those regarded as a taxpayer's "*relative*" is his or her spouse.[3] A "*spouse*" of an individual is defined in s 995-1(1) to include:

"*(a) another individual (whether of the same sex or a different sex) with whom the individual is in a relationship that is registered under a *State law or *Territory law prescribed for the purposes of section 2E of the* Acts Interpretation Act 1901 *as a kind of relationship prescribed for the purposes of that section; and*

(b) another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple."

[3] ITAA97; s 995-1(1), paragraph (a) of the definition

Relevant provisions of the Disability Discrimination Act

10. Section 3 of the DDA sets out its objects:

> "*The objects of this Act are:*
>
> *(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:*
>
> *(i) work, accommodation, education, access to premises, clubs and sport; and*
>
> *(ii) the provision of goods, facilities, services and land; and*
>
> *(iii) existing laws; and*
>
> *(iv) the administration of Commonwealth laws and programs; and*
>
> *(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and*
>
> *(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.*"

11. Section 29 provides that:

> "*It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person on the ground of the other person's disability in the performance of that function, the exercise of that power or the fulfilment of that responsibility.*"

12. ITAA97 comes within the expression "*Commonwealth law*" as it is defined in s 4(1) of the DDA. The word "*discriminate*" is given its meaning by ss 5 and 6.[4] Section 5 is concerned with direct disability discrimination:

> "*(1) For the purposes of this Act, a person (the* **discriminator***) discriminates against another person (the* **aggrieved person***) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.*
>
> *(2) For the purposes of this Act, a person (the* **discriminator***) also* **discriminates** *against another person (the* **aggrieved person***) on the ground of a disability of the aggrieved person if:*
>
> *(a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and*
>
> *(b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability,*

[4] DDA; s 4(1)

treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

(3) For the purposes of this section, circumstances are not **materially different** *because of the fact that, because of the disability, the aggrieved person requires adjustments."*

13. Indirect disability discrimination is the subject of section 6. In this context, however, it is not relevant because there is no suggestion that the Commissioner requires, or proposes to require, WTPG to comply with any condition or requirement by reason of his disability or otherwise.

OUTLINE OF THE SUBMISSIONS

14. On behalf of WTPG, Mr Nash QC of counsel acknowledged that the case of *Re Gilbert and Federal Commissioner of Taxation*[5] (*Gilbert*) was a case in which a deduction claimed in similar circumstances had been disallowed by the Commissioner. That case was decided, however, in 1982 and it is to be expected that such an outcome would, since the enactment of the DDA, constitute discrimination within the meaning of that legislation.

15. There is no conflict between s 8-1 of ITAA97 and the provisions of the DDA for the former section should be interpreted in light of the latter. That means that the expenses of engaging a carer or physical assistant that are necessarily incurred in performing a taxpayer's duties as an employee and to the extent that they are so used can no longer be treated as personal or domestic expenses.

16. The reference to expenses of a private or domestic nature must be understood in light of the DDA. That legislation changed the context in which s 8-1 and the tax law generally must be construed. Even in 1958 in *Lunney v Federal Commissioner of Taxation*[6] (*Lunney*), Dixon CJ had expressed reservations about the established law regarding the interpretation of what constituted expenditure of a private or domestic nature. The introduction of the DDA into the context means that, to adapt his Honour's words, it is now necessary to "*work the matter out all over again according to reason*".[7]

17. Mr Nash submitted that there appears to be a conflict between s 26-30 of ITAA97 and s 5 of the DDA. That conflict may be resolved by taking the purposive approach to statutory construction as required by *Project Blue Sky v Australian Broadcasting Authority*[8] (*Project Blue Sky*). Section 26-30 is concerned with the deduction of expenses of a relative as a

[5] (1982) 82 ATC 141; Messrs Stevens, Chairman, Harrowell and Pape, Members
[6] [1958] HCA 5; (1958) 100 CLR 478; Dixon CJ, Williams, Kitto and Taylor JJ; McTiernan J dissenting
[7] [1958] HCA 5; (1958) 100 CLR 478 at 486
[8] [1998] HCA 28; (1998) 194 CLR 355; 72 ALJR 841; 153 ALR 490; McHugh, Gummow, Kirby and Hayne JJ; Brennan CJ dissenting

relative and not as a carer. Mrs WTPG was not travelling in her capacity as a relative. Although dealing with a completely different subject matter, the reasoning required is apparent in the judgments of the Full Court of the Supreme Court of Victoria in *Abbott v Transport Accident Commission*.[9]

18. On behalf of the Commissioner, Mr Flynn QC of counsel submitted that s 26-30 operates to deny WTPG a deduction for the travel expense of his wife in the 2014 year. As she was his wife, it followed that the Travel Expense was attributable to a relative's travel when she accompanied him as he travelled in the course of performing his duties as an employee for the purpose of gaining or producing his assessable income. The qualification to that conclusion did not apply as she had not performed substantial duties as an employee of WTPG or of his employer.

19. That interpretation of s 26-30 is not inconsistent with the DDA when properly construed. Even if it were, the DDA would not override it, Mr Flynn submitted. While accepting that the DDA can apply to the Commissioner in performing his functions and exercising his powers, it is not intended to affect the application or interpretation of the legislation. Had it been intended to have that effe*ct,* it would have included a provision such as s 10 in the *Racial Discrimination Act 1975* (Racial Discrimination Act) and s 50 of the *Equal Opportunity Act 2010* (Vic) (EO Act).

20. In relation to s 8-1, Mr Flynn submitted that the Travel Expense is not deductible for two reasons. The first was that it was incurred too soon to be deductible so that it was not incurred in gaining or producing WTPG's assessable income. It was incurred in order to put WTPG in a position where he could undertake the tasks from which income would be derived. The second was that it was of a private or domestic nature and so specifically denied under s 8-1(2)(b).

CONSIDERATION

What is discrimination within the meaning of the DDA?

21. In *Fortescue Metals Group Limited v The Commonwealth of Australia*[10] (*Fortescue Metals*) the High Court considered the concept of discrimination in the context of s 51(ii) of the Constitution. It provides that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to "*taxation; but so as not to discriminate between States or parts of States*". It had been

[9] [1991] VicRp 51; [1991] 2 VR 116; Crockett, McGarvie and Southwell JJ
[10] [2013] HCA 34; (2013) 250 CLR 548; 300 ALR 26; 87 ALJR 935; 89 ATR 1; French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ

submitted that, in imposing a "*mineral rent*" at a uniform cumulative rate throughout the Commonwealth, the *Minerals Resource Rent Tax Act 2012* (MRRT Act) discriminated among the States by equating the "*sacrifice*" of miners in low royalty States with that of miners in high royalty States.

22. In their joint judgment, Hayne, Bell and Keane JJ observed that, to the extent that the amount of minerals resource rent tax (MRRT) paid varies from State to State because different rates of royalty are charged, those variations are due to the different conditions that exist in those different States and differences in their legislative regimes.[11] They observed that:

> " *To discriminate* against *someone or something is 'to make an adverse distinction with regard to; to distinguish unfavourably from others' … And, of course, there has evolved a developed body of thinking about how the notions of 'adverse' or 'unfavourable' discrimination are to be understood and applied.*
>
> *Discrimination connotes comparison … It directs attention to whether like cases are treated alike and different cases differently. But there may be two distinct questions that must be answered. First, are the cases that are being compared alike or different? Secondly, are the two cases treated alike or differently? It is particularly in the context of questions of 'adverse' or 'unfavourable' discrimination (or their converse cases of 'preference' or 'advantage') that comparison is central to identifying discrimination. In undertaking the task of comparison, it is often necessary to exercise great care when identifying the relevant comparator …; for it is necessary to identify a comparator that will enable identification of some relevant difference in treatment of cases that are alike, or some relevant identity of treatment of cases that are different. And it is in that same kind of context that it may be necessary to examine 'the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified' …*
>
> *In applying the limitation contained in s 51(ii), there is no question about selecting an appropriate comparator. Section 51(ii) expressly provides for the comparison that must be made. Does the impugned law discriminate* between States or parts of States*? Section 51(ii) thus provides that, whatever differences may be observed between States or parts of States, a law of the Parliament with respect to taxation may itself neither create nor draw any distinction between States or parts of States.*"[12]

23. In support of their statement that "*discrimination connotes comparison*", Hayne, Bell and Keane JJ cited the case of *Purvis v New South Wales*[13] (*Purvis*), which had been decided under the DDA. That case concerned s 22(1) of the DDA. That section made it unlawful for an educational authority to discriminate against a person on the ground of the person's disability by refusing, or failing to accept, that person's application for admission as a

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[11] [2013] HCA 34; (2013) 250 CLR 548; 300 ALR 26; 87 ALJR 935; 89 ATR 1; at [107]; 602; 60-61; 963; 37
[12] [2013] HCA 34; (2013) 250 CLR 548; 300 ALR 26; 87 ALJR 935; 89 ATR 1; at [111]-[113]; 603-604; 61-62; 963-964; 37-38 (citations omitted)
[13] [2003] HCA 62; (2003) 217 CLR 92; 202 ALR 133; 78 ALJR 1; 77 ALD 570; Gleeson CJ, Gummow, Heydon and Callinan JJ; McHugh and Kirby JJ dissenting

student or in the terms or conditions on which it was prepared to admit that person as a student. As a consequence of suffering a severe brain injury resulting from an illness when he was a baby, Daniel had behavioural problems. The Human Rights and Equal Opportunity Commission (HREOC) upheld a complaint that he had been discriminated against by the State of New South Wales by being treated less favourably in his education and by his suspension, and subsequent exclusion, from a State school by its principal on the ground of his violent behaviour towards staff and other students. His violent behaviour was held to result from his disability.

24. Mr Nash referred me to two passages from the judgment of McHugh and Kirby JJ. They are not consecutive but I will set them out as a group:

> "*93. In most …, but not all …, areas in which the Act operates there is an exception that allows for discrimination to occur if it would impose 'unjustifiable hardship' on the discriminator to provide the services or facilities required by the person with the disability. Section 4(1) declares that 'unjustifiable hardship' has the meaning given by s 11. Section 11 states that in determining what constitutes unjustifiable hardship, all relevant circumstances are to be taken into account. They include, relevantly, the nature of the benefit or detriment likely to accrue to, or be suffered by, the persons concerned, the effect of the disability, and 'the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship'.*
>
> *…*
>
> *97. The Supreme Court of Canada has explained why a requirement of accommodation is necessary to achieve true equality for the disabled. In* Eaton v Brant County Board of Education *…, Sopinka J said:*
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> > *"Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual ... Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses 'the attribution of stereotypical characteristics' reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment."*[14]

25. These passages appear, however, in the joint judgment of McHugh and Kirby JJ who were in dissent. The majority took a different view. It is illustrated by Gleeson CJ in the following passage from his judgment:

> " *The Act deals with discrimination in a normative, not a value-free, context. Section 22, with which this case is concerned, proscribes discrimination*

[14] [2003] HCA 62; (2003) 217 CLR 92; 202 ALR 133; 78 ALJR 1; 77 ALD 570 at [93] and [97]; 123-125; 155-157; 18-19; 593-595

> *'against' a person on the ground of the person's disability. In some contexts, discrimination may be regarded, in terms of values, as neutral, or even positive; but not in this context. The Act is concerned with discrimination of a kind that the legislature regards as unjust, and makes unlawful. The question is whether the Act treats certain action taken in respect of conduct that affects, not only the person said to be the victim of the discrimination, but other persons whom the alleged discriminator is obliged by law to protect, as unjust and unlawful discrimination. ....*"[15]

26. In the context of the factual circumstances under consideration in that case, Gleeson CJ analysed the issues in his conclusion:

> " *In identifying and considering the basis of, and/or the legitimacy of, a decision, for the purpose of measuring the conduct of an alleged discriminator against the requirements of the Act, it is proper, and may be necessary, to have regard to the objects of the Act as defined in s 3, and to the scope and purpose of the legislation. Even though functional disorders may constitute a disability, and disturbed behaviour may be an aspect of a disability, it is not contrary to the scheme and objects of the Act to permit a decision-maker to identify a threat to the safety of other persons for whose welfare the decision-maker is responsible, resulting from the conduct of a person suffering from a disorder, as the basis of a decision. Just as questions of causation may be affected by normative considerations arising out of the legal context in which they are to be answered …, a statutory question as to the basis of a person's decision may be affected by similar considerations. There is no reason for rejecting the principal's statement of the basis of his decision as being the violent conduct of the pupil, and his concern for the safety of other pupils and staff members. It is not incompatible with the legislative scheme to identify the basis of the principal's decision as that which he expressed. On the contrary, to identify the pupil's disability as the basis of the decision would be unfair to the principal and to the first respondent. In particular, it would leave out of account obligations and responsibilities which the principal was legally required to take into account.*"[16]

27. In their joint judgment, Gummow, Hayne and Heydon JJ considered a submission made on behalf of Mr Purvis that the decisions to suspend and ultimately exclude Daniel were brought about by his disability. If it is right to characterise Daniel's disturbed behaviour as part of his disability, Daniel was treated as he was "*because of*" his disability. It followed, the submission continued, that he was treated less favourably than a person without a disability because his behaviour was brought about by his disability. The relevant comparator was said to be Daniel without his disturbed behaviour.

28. Their Honours rejected this submission saying that it sought to direct attention to a wholly hypothetical set of circumstances defined by excluding all features of his disability. They said that:

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[15] [2003] HCA 62; (2003) 217 CLR 92; 202 ALR 133; 78 ALJR 1; 77 ALD 570 at [7]; 99; 135-136; 4; 573-574
[16] [2003] HCA 62; (2003) 217 CLR 92; 202 ALR 133; 78 ALJR 1; 77 ALD 570 at [14]; 102-103; 138-139; 6; 576-577

> " *In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a person without the disability, s 5(1) requires that the circumstances attending the treatment given (or to be given) to a disabled person must be identified. What must then be examined is what would have been done in* those *circumstances if the person concerned was not disabled. The appellant's argument depended upon an inversion of that order of examination. …*"[17]

29. The approach required by s 5(1) is this:

> "*… Once the circumstances of the treatment or the intended treatment have been identified, a comparison must be made with the treatment that would have been given to a person without the disability in circumstances that were the same or were not materially different.*
>
> *… Section 5(1) then presented two questions: (i) How, in* those *circumstances, would the educational authority have treated a person without Daniel's disability? (ii) If Daniel's treatment was less favourable than the treatment that would be given to a person without the disability, was that because of Daniel's disability? Section 5(1) could be engaged in the application of s 22 only if it were found that Daniel was treated less favourably than a person without his disability would have been treated in circumstances that were the same as or were not materially different from the circumstances of Daniel's treatment.*"[18]

30. Gummow, Hayne and Heydon JJ went on to identify five reasons why their interpretation does not frustrate the proper interpretation of the DDA. Only the final three are relevant in this case:

> " *The third point to make about the construction of s 5(1) which we have proffered is that, on that construction, the provision still has very important work to do by preventing the different treatment of persons with disability. As pointed out earlier, other legislatures have sought to go further than provide for equality of treatment. But s 5(1) does not take that further step. Rather, it requires comparison with a person without the disability, in the same position in all material respects as the aggrieved person ….*
>
> *Fourthly, it is a construction of the section which does not depend upon distinguishing between the cause of a person's disability and the effects or consequences of it. Indeed, it is a construction which embraces the importance of identifying (as part of the relevant circumstances) all the effects and consequences of disability that are manifested to the alleged discriminator. What then is asked is: how would that person treat another in those same circumstances?*
>
> *Finally, it is a construction which gives separate and important work to all of the elements of s 5(1). The answer to the question presented by treatment 'because of' disability does not determine the separate, comparative, question which must be asked: how would the discriminator treat or have treated a person without the disability in the relevant circumstances?*"[19]

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[17] [2003] HCA 62; (2003) 217 CLR 92; 202 ALR 133; 78 ALJR 1; 77 ALD 570 at [223]; 160; 185; 39-40; 623
[18] [2003] HCA 62; (2003) 217 CLR 92; 202 ALR 133; 78 ALJR 1; 77 ALD 570 at [224]-[225]; 161; 185-186; 40; 623-624
[19] [2003] HCA 62; (2003) 217 CLR 92; 202 ALR 133; 78 ALJR 1; 77 ALD 570 at [229]-[231]; 162; 187-188; 40-41; 624-625

Interaction of the DDA and ITAA97

A. Relevant provisions of the DDA and ITAA97 not inconsistent with each other

31. Section 3 of the DDA sets out its objects. Those objects are an important element in establishing the purpose of the legislation. That purpose is itself an essential element in interpreting the provisions of the legislation and it is, in part, to be found in an enactment's stated objects as well as in its text and structure informed, as appropriate, by extrinsic material.[20] What those objects do not do is to establish standards regulating behaviour. Those standards are to be found in remaining provisions of the DDA. Therefore, for example, when ss 3(a)(iii) and (iv) provide that two of the objects of the DDA are to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of existing laws and the administration of Commonwealth laws and programs, the relevant tenets are to be found in ss 29 and 47.

32. On its face, s 29 relates not to the content of the law but to the performance of a function, exercise of a power, administration of a Commonwealth law or conduct of a Commonwealth program. In the performance of that function, the exercise of that power or the fulfilment of that responsibility, it is unlawful for a person to discriminate against another person on the ground of the other person's disability. In limiting the scope of the circumstances in which discrimination is prohibited to the performance of a function, exercise of a power or fulfilment of a responsibility, it could be argued that s 29 does not extend to the application or interpretation of the legislation itself. But is that a valid argument? If a decision-maker is required by a particular enactment to exercise a power to make a decision on grounds that themselves discriminate against a person on the grounds of a person's disability, will he or she not be in breach of s 29 in exercising that power? It seems to me that the decision-maker will clearly be in breach. That follows from the clear words of s 29, which do not provide for any exemption or amelioration from the prohibition it imposes.

33. That conclusion also follows from s 47 of the DDA as currently drafted and from its legislative history. As currently drafted, s 47 deals with two discrete areas. The first is found in s 47(1) and it has two parts. The first of those parts, set out in ss 47(1)(b) and (c), provides that Part 2, which includes s 29, does not render unlawful anything done by a person in direct compliance with an order of a court or, in certain circumstances, with instruments that are instruments under the *Fair Work Act 2009* or the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009. The second part of

[20] *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378; 293 ALR 412; 87 ALJR 131; French CJ, Hayne and Kiefel JJ; Crennan and Bell JJ dissenting at [25]; 389-390; 418-419; 138 per French CJ and Hayne J and see also [70]; 405-406; 431-432; 147-148 per Kiefel J

s 47(1) is set out in s 47(1)(d) when read with ss 47(4) and (5). They provide that Part 2 of the DDA does not render unlawful anything done by a person in direct compliance with an order, award or determination of a court or tribunal having power to fix minimum wages to the extent that specific provisions are made for persons who are in receipt of salaries or wages determined by reference to their capacity and who, if not in receipt of those salaries or wages, would be eligible for a disability support pension within the meaning of the *Social Security Act 1991* (SS Act).

34. The second area dealt with in s 47 is set out in s 47(2) when it provides:

> "*This Part does not render unlawful anything done by a person in direct compliance with a prescribed law*."

Those laws that come within the description of a "*prescribed law*" are set out in Schedule 1 to the *Disability Discrimination Regulations 1996* (DD Regulations). They include Part 9D of the Commonwealth's *Broadcasting Services Act 1992* and *Civil Aviation Order* 20.16.3 as well as certain New South Wales and South Australian legislation. ITAA97 is not a prescribed law.

35. The note to s 47(5) of the DDA refers to s 98(6B) of the *Civil Aviation Act 1988* (CA Act). That legislation allows regulations made under it to contain provisions that are inconsistent with the DDA if the inconsistency is necessary for the safety of air navigation. There is nothing in ITAA97 to that effect.

36. It follows that, unless a law is a prescribed law or unless the enactment itself provides that it may contain provisions that are inconsistent with the DDA, a decision-maker in breach of s 29 cannot call in his or her defence the fact that the decision was made in direct compliance with the law.

37. That conclusion may seem unfair for a decision-maker carrying out an executive function under an enactment has no responsibility for, or power over, the legislative arm of government that has made the law. When regard is had to the history of the section, it can be seen that Parliament has evinced an intention to remove from the statute book any discrimination on the grounds of disability. When first enacted, s 47(1)(b) and (c) was to the same broad effect as it is today. So too was s 47(2) but there was also enacted s 47(3) which applied more broadly when it provided that:

> "*During the period beginning at the commencement of this section and ending 3 years after the day this section commences, this Part does not render unlawful anything done by a person in direct compliance with another law*."

The word "*law*" was defined to mean a law of the Commonwealth or of a State or Territory or any regulations or any instrument made under such a law.[21]

38. The reason for enacting s 47(3) was set out in the Explanatory Memorandum to the *Disability Discrimination Bill 1992* but I will also include the passage relating to s 47(2):

> "*Subclause 2 recognizes that there will be some laws which will continue to discriminate against people with disabilities notwithstanding the provisions of this Bill. In particular it is not intended that this Bill would override the provisions of the State legislation in certain areas, for example mental health. This subclause allows for regulations to be made setting out legislation that will be exempted from the operations of this Bill.*
>
> *So as to allow for laws which do discriminate to be modified, subclause 3 provides that where someone operates in accordance with an existing law this Part does not make that action unlawful. This provision lasts for only 3 years from the day that Clause 47 comes into force.*"

39. Section 47 came into force on 1 March 1993. It was repealed by s 3 and Item 72 of Schedule 2 of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* with effect from 5 August 2009.[22] As cl 103 of the Explanatory Memorandum noted, the period of three years had then expired and the provision was redundant. Even before the repeal of s 47(3), it is clear from those laws that are prescribed laws that Parliament intended that the Commonwealth's laws and those of the States and Territories would be reviewed to ensure that, subject to the need to protect other essential interests such as public safety, they were not discriminatory on the grounds of disability.

40. In view of that, there has been no need for Parliament to include in the DDA a provision such as s 10 of the Racial Discrimination Act (RD Act). Section 10(1) is directed to the content of the law. It is headed "*Rights to equality before the law"* and provides:

> "*If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.*"

41. Section 50 of the Victorian EO Act is cast in equivalent terms in relation to the disposal of land. In summary, its prohibition on discrimination in the disposal of land or regarding the

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[21] DDA; s 47(5)
[22] *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009*; Act No. 70 of 2009; s 2(1), Item 3

terms of that disposal applies regardless of any provision in any other Act or document.[23] Again, there is no provision to that effect in the Commonwealth's DDA and no need for it.

42. Mr Flynn drew my attention to the Productivity Commission Inquiry Report entitled "*Review of the Disability Discrimination Act 1992*" dated 30 April 2004.[24] The extract to which he drew my attention stated:

> "*As noted in section 9.1, the original Disability Discrimination Bill included provisions that would have allowed people to use the DDA to challenge legislation that was discriminatory, similar to provisions of the* Racial Discrimination Act 1975 …. *These provisions were dropped as a result of concerns about their possible effect on special legal regimes in relation to people with disabilities, including guardianship and mental health legislation …*"[25]

43. An examination of the *Disability Discrimination Bill 1992* as introduced in Parliament does not contain any such provisions but section 9.1 of the Productivity Report explains that:

> "*The DDA contains few, if any, substantive provisions that relate directly to the object of equality before the law. As the Human Rights and Equal Opportunity Commission (HREOC) stated '… the reach of the substantive provisions of the DDA is limited compared to this object' (sub. 143, p. 39).*
>
> *Early drafts of the Disability Discrimination Bill contained specific provisions on equality before the law, but these were dropped before the Bill was presented to Parliament (section 9.5).*"

44. The omission of such provisions is one of the issues to be kept in mind when construing the DDA and a later enactment such as ITAA97. I am mindful of the general rule of construction set out by Gaudron J in *Saraswati v The Queen*.[26] That rule is:

> " *It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other … More particularly, an intention to affect the earlier provision will not be implied if the later is of general application … and the earlier deals with some matter affecting the individual … Nor will an intention to affect the earlier provision be implied if the later is otherwise capable of sensible operation. …*"[27]

45. The history of s 47 and its current context, including that of s 29, in light of the object of the DDA leads me to conclude that Parliament intended that it would take one of two courses if

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[23] EO Act; ss 50(1) and (3)
[24] Report No. 30
[25] Report No. 30; section 9.5
[26] [1991] HCA 21; (1991) 172 CLR 1; 100 ALR 193; 65 ALJR 402; Toohey, Gaudron and McHugh JJ; Deane and Dawson JJ dissenting
[27] [1991] HCA 21; (1991) 172 CLR 1; 100 ALR 193; 65 ALJR 402 at 17-18; 204; 408

it thought that there were some policy reason justifying discrimination on the basis of a person's disability. One course was to prescribe the relevant law for the purposes of s 47(2). The second course was that taken by Parliament in relation to s 98(6B) of the CA Act. It included a reference to that provision in a note to s 47(5) of the DDA. In that way, Parliament clearly signalled its intention that, to the extent that s 98(6B) was inconsistent with the DDA, s 98(6B) was to prevail.

46. When Parliament came to enact ITAA97 and ss 8-1 and 26-30 in particular, it intended that they be understood and applied by the Commissioner in a manner that does not discriminate against another person on the ground of that other person's disability. In view of what I think is the ordinary and intended meaning of the relevant provisions of ITAA97 and to which I will come below, I do not think that the DDA and those provisions are inconsistent with each other or that they overlap.

B. Administration of ss 8-1 and 26-30 of ITAA97

47. Even though there is no inconsistency between the DDA Act and the relevant provisions of ITAA97, regard still has to be had to the way in which ITAA97 is administered and the way in which the Commissioner exercises his powers. Whether there has been any discrimination in the way in which the Commissioner has made his ruling in this case will depend first upon an analysis of the relevant provisions for they form the circumstances in which the discrimination is said to arise. The next question to be answered focuses on how the Commissioner would have decided a claim for deduction made by a person without WTPG's disability. Having determined that, was the decision that the Commissioner made in relation to WTPG's claim less favourable than the decision he would have made in relation to a claim for deduction made by a person without that disability. If so, was the reason for the Commissioner's decision being less favourable WTPG's disability.

ITAA97 and section 8-1(1)(a)

48. Subject to the qualification in s 8-1(2), a taxpayer can deduct from his or her assessable income any loss or outgoing to the extent that it was "… *incurred in gaining or producing …* [his or her] *assessable income*". This is paragraph (a) of the first limb of s 8-1(1). Paragraph (b) does not apply as WTPG was not carrying on a business. The qualification in s 8-1(2) is the second limb. It excludes from s 8-1(1) those losses or outgoings that are of a private nature.

A. The first limb: 8-1(1)(a)

A.1 The authorities

49. Section 8-1 is to the same effect as s 51(1) of the *Income Tax Assessment Act 1936* (ITAA36), which has been interpreted by previous authorities. Reference to some of those authorities by the High Court in the case of *Federal Commissioner of Taxation v Anstis*[28] (*Anstis*) where the plurality said:

> "*… [T]he test to be applied to deductions under s 8-1(1)(a) is not materially different from its predecessors, and regard may be had to the decided cases concerning the latter … The preposition 'in' found in the phrase 'in gaining or producing' has long been understood as meaning 'in the course of' gaining or producing … In* Ronpibon Tin NL v Federal Commissioner of Taxation *…, when dealing with s 51(1) of the 1936 Act, this Court held that for a loss or outgoing to be deductible it is 'both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income'.*"[29]

50. The plurality pointed out that:

> "*… The notion of 'gaining or producing' income within the meaning of s 8-1(1)(a) is wider than those activities which may be said to* earn *income. According to its ordinary meaning, to 'gain' means not only to 'earn or obtain (a living) but to 'obtain, secure or acquire' or to 'receive' … Similarly, the ordinary meaning of the verb 'produce' is to 'bring (a thing) into existence' … and is not limited to bringing something into existence by mental or physical labour.*
>
> *Essential to the inquiry of deductibility is the identification of that which is productive of the assessable income … To put it another way, one must ask how the assessable income was (or was expected to be) gained or produced. …*"[30]

51. The analysis that is required is illustrated by the facts in *Anstis*. Ms Anstis, a full-time university student, qualified for the payment of Youth Allowance (YA) under the SS Act. She was required to satisfy the activity test in order to retain the YA and did so by undertaking full-time study. In her income tax return, she returned the YA payments as assessable income and claimed an amount of self-education expenses as an allowable deduction. The Commissioner disallowed her claim. On appeal, the High Court held that the YA payments were income according to ordinary concepts because a recipient could expect to receive and rely on them provided he or she satisfied the requirements of the SS Act. Ms Anstis had satisfied those requirements. In doing so, she had incurred the self-education expenses. Putting it another way, the reason for the expenditure was to be

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[28] [2010] HCA 40; (2010) 241 CLR 443; 272 ALR 1; 76 ATR 735; 85 ALJR 122; 2010 ATC ¶20-221
[29] [2010] HCA 40; (2010) 241 CLR 443; 272 ALR 1; 76 ATR 735; 85 ALJR 122; 2010 ATC ¶20-221 at [27]; 455; 9; 744; 129; 11654 per French CJ, Gummow, Kiefel and Bell JJ with whom Heydon J agreed (citations omitted)
[30] [2010] HCA 40; (2010) 241 CLR 443; 272 ALR 1; 76 ATR 735; 85 ALJR 122; 2010 ATC ¶20-221at [29]-[30]; 455-456; 9-10; 745; 130; 11654

found in what Ms Anstis did to retain her entitlement to YA, and so what she did to gain or produce her income. Her reason for embarking on the course of study at all was not determinative of the question whether she was entitled to that deduction.

52. The case of *Anstis* underlines the need to analyse the nature of the expenditure and its relationship to the gaining or production of the income very carefully. Although in a very different context, the analysis required in finding the nexus between gaining or producing income and a loss or expenditure incurred in the course of its gain or production is not so different from that undertaken by the Victorian Court of Appeal in *Abbott v Transport Accident Commission*[31] (*Abbott*). That was a case to which Mr Nash referred me. The late Mr Abbott had been accidentally killed when a tree fell upon him. A wire from an electric winch fitted on a Toyota Land Cruiser had been attached to the tree. The winch was battery powered and was controlled by a remote control switch attached to a wire plugged into a socket in the vehicle. In order not to flatten the battery, it was desirable to run the motor of the vehicle.

53. The issue was whether Mr Abbott's death arose out of the use of the motor vehicle within the meaning of s 3 of the *Transport Accident Act 1986*. Crockett J's approach to the issue was consistent with those of McGarvie and Southwell JJ when he said:

> "*I think that the respondent is correct when he contends that the first step is to categorise the vehicle. The second, then, is to determine whether there was a relevant use of it as a categorised vehicle. If there was then it is sufficient if that use 'is one that is not utterly foreign to its character as a motor vehicle' thus categorised … But the first step remains to characterise the vehicle. The vehicle plainly was not a mobile winch in the sense that a vehicle may be a mobile crane or compressor with a specific use (or even have dual uses). The use of a vehicle as a motor vehicle will vary according to the nature of the vehicle.*
>
> *Just as the incident arose out of the use of a winch so, equally plainly, it did not arise out of the use of the land cruiser as such. It was 'utterly foreign' to the normal use of the motor vehicle…*'[32]

54. Examples in the context of the predecessor of ITAA97, ITAA36, were referred to by counsel. In *Commissioner of Taxation v Finn*[33] (*Finn*), the High Court considered expenses incurred by an architect, Mr Finn, in travelling overseas for the purpose of bringing himself up to date with the current trends, improving his skills and of bettering the prospects of his being promoted in the future by his employer. As for promotion, he had a particular promotion in mind. He was the most senior architect at his level in a State Government Department and he hoped that his additional knowledge would put him in a good position to

[31] [1991] VicRp 51; [1991] 2 VR 116; Crockett, McGarvie and Southwell JJ
[32] [1991] VicRp 51; [1991] 2 VR 116 at 118-119
[33] [1961] HCA 61; (1961) 106 CLR 60; Dixon CJ, Fullagar, Kitto and Windeyer JJ

step over two more senior architects and gain the position of Principal Architect when the occupant of the position retired within the following year or so. Mr Finn used his recreation and long service leave and spent all available time on achieving his purpose. His employer asked him to extend his trip and covered his additional costs. Mr Finn claimed the expenses he had incurred on that trip, rather than those met by his employer, as a deduction from his assessable income. The Commissioner did not allow that deduction but, on appeal, the High Court found that it was an expense incurred in gaining or producing assessable income.

55. Dixon CJ noted that s 51, as then drawn, did not require that the amount claimed as a deduction in a year of income be restricted to the gaining or production of assessable income in that same year of income.[34] His Honour analysed the nature of Mr Finn's employment and the way in which the knowledge he gained would assist him and be seen by his Department as assisting him. Windeyer J expressed it this way:

> "*…Generally speaking, it seems to me, a taxpayer who gains income by the exercise of his skill in some profession or calling and who incurs expenses in maintaining or increasing his learning, knowledge, experience and ability in that profession or calling necessarily incurs those expenses in carrying on his profession or calling. Whether he be paid fees by different persons seeking his skilled services from time to time, or be paid a regular salary by one person employing him to exercise his skill, matters not in my opinion. …*"[35]

56. Reference was made to *Finn* when the case of *Commissioner of Taxation v Cooper*[36] (*Cooper*) was heard by the Full Court of the Federal Court. Mr Cooper was a professional rugby league player who played as a forward in the First Grade competition in the New South Wales Rugby League. In order to maintain his optimum playing weight during the off-season, he was ordered by his coach to eat extra food in the off-season. He did that and claimed the cost of the additional food as a deduction in the 1980, 1981 and 1982 years of income on the basis that it represented expenditure incurred in gaining his assessable income. The Commissioner disallowed his claim. The majority of the Full Court of the Federal Court agreed with him.

57. Mr Cooper had a contract with his Club for the 1980 and 1981 years of income and a "*club option*" for the 1982 year of income. He was paid a signing on fee for each of 1980 and 1981 and various payments depending on the matches he played, the grade in which he played, the results of the games and whether he was chosen to represent his State or Australia. Lockhart J summarised what must be established under s 51(1):

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[34] [1961] HCA 61; (1961) 106 CLR 60 at 68
[35] [1961] HCA 61; (1961) 106 CLR 60 at 70 and see also Kitto J: [1961] HCA 61; (1961) 106 CLR 60 at 69-70
[36] (1991) 29 FCR 177; 99 ALR 703; 91 ATC 4396; 21 ATR 1616; Lockhart and Hill JJ; Wilcox J dissenting

> " *For expenditure to be an allowable deduction as an outgoing incurred in gaining or producing the assessable income, it must be incidental and relevant to that end: … This test of deductibility has been explained in subsequent judgments of the High Court, so that to be deductible the expenditure must be incidental and relevant in the sense of having the essential character of expenditure incurred in the course of gaining or producing assessable income. …*"[37]

58. In applying the test, it is relevant to have regard to the terms and conditions of an employee's employment in determining whether expenditure incurred by the employee satisfies the first limb of s 51(1). Lockhart J concluded that:

> " *The taxpayer incurred the expenditure on additional food and drink for the purpose of increasing his weight and thus to play professional football and earn assessable income. But its character as the cost of additional food and drink is neither relevant nor incidental to the training for and playing of football matches, which is the activity by which he gained assessable income. The expenditure was not incurred in or in the course of that activity. The taxpayer was paid money to train for and play football, not to consume food and drink. His income-producing activities did not include the consumption of food and drink.*"[38]

59. In his judgment, Hill J referred to, among others, the case of *Federal Commissioner of Taxation v Maddalena*[39] (*Maddalena*). Mr Maddalena claimed as a deduction expenditure he had incurred in travelling from Wollongong to Sydney to negotiate with various rugby league clubs who had expressed interest in gaining his services as a player. At the time, he was registered as a player with the Western Suburbs Rugby League Football Club (Wests). The essence of the High Court's rejection of Mr Maddalena's claim for a deduction is found in the judgment of Barwick CJ:

> "*… The cost to an employee of obtaining his employment does not form an outgoing incurred in the course of earning the wages payable in employment. That cost is not deductible under s 51 of the Income Tax Assessment Act 1936-1967.*"[40]

60. Mr Nash referred to the case of *Lunney* and particularly to the judgment of Dixon CJ. It was held by the majority in that case that fares paid by taxpayers, whether employed or carrying on their own business, in travelling day by day from their homes to their place of employment or business and back again are not deductible expenses under s 51(1) of ITAA36 against the assessable income earned in that employment or business. Dixon CJ acknowledged that this conclusion was consistent with long standing authority but expressed certain misgivings about it saying:

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[37] (1991) 29 FCR 177; 99 ALR 703; 91 ATC 4396; 21 ATR 1616 at 181; 707; 4400; 1620
[38] (1991) 29 FCR 177; 99 ALR 703; 91 ATC 4396; 21 ATR 1616 at 185; 711; 4403; 1623-1624
[39] (1971) 2 ATR 541; 45 ALJR 426; 71 ATC 4161; Barwick CJ, Menzies, Windeyer, Owen and Walsh JJ
[40] (1971) 2 ATR 541; 45 ALJR 426; 71 ATC 4161 at 548; 426; 4162 and see also Menzies J, with whom Barwick CJ, Windeyer and Owen JJ agreed, at 549-550; 427; 4163

> "*… To escape from the course of reasoning on which the decisions proceed requires the taking of refined and rather insubstantial distinctions. I confess for myself, however, that if the matter were to be worked out all over again on bare reason, I should have misgivings about the conclusion. But this is just what I think the Court ought not do. It is a question of how an undisputed principle applies. Its application was settled by old authority long accepted and always acted upon. If the whole subject is to be ripped up now it is for the legislature and not for the Court to do it. I therefore would answer the questions in the special cases that the sums respectively mentioned are not deductible either wholly or in part.*"[41]

61. Mr Nash submitted that the legislature has taken up the challenge to rip up the previous authority in so far as a taxpayer suffering from a disability is concerned. It has done that by way of its enactment of the DDA, Mr Nash has submitted. It seems to me that it has not. There is nothing in the DDA that alters the approach taken by the courts in the interpretation and application of s 8-1 of ITAA97 or of its predecessor, s 51(1) of ITAA36, or that requires any alteration of their approach.

62. As the authorities to which I have referred have shown, what is required by s 8-1(1)(a) is an analysis of the loss or expenditure incurred by the taxpayer in the course of gaining or producing that assessable income or at least expecting to gain or produce it. The link between the two must be direct e.g. *Cooper*. It is not enough, for example, that the loss or expenditure has been incurred in order to put the taxpayer in a better position to obtain employment that will lead to his or her gaining or producing assessable income e.g. *Maddalena*. Provided that the link is direct, it does not matter whether, in incurring the loss or expenditure, the taxpayer may intend or hope to obtain another advantage either at the time or in the future e.g. *Anstis*.

63. Even if expenditure must be incurred in order to get a taxpayer to his or her place of employment or business where he or she gains or produces assessable income or expects to do so, that link is not sufficiently direct to say that the loss or expenditure was incurred in the course of gaining or producing assessable income. That was decided by *Lunney*, in which Dixon CJ expressed his reservations. The same approach was taken much later and after the enactment of the DDA by the majority of the High Court in *Commissioner of Taxation v Payne*[42] (*Payne*). As Gleeson CJ, Kirby and Hayne JJ said:

> " *The connection which must be demonstrated between an outgoing and the assessable income, in order to fall within the first limb of s 51(1), is that the outgoing is 'incurred in gaining or producing' that income. The subsection does not speak of outgoings incurred 'in connection with' the derivation of assessable income or outgoings incurred 'for the purpose of' deriving assessable income. It has long*

[41] [1958] HCA 5; (1958) 100 CLR 478 at 486
[42] [2001] HCA 3; (2001) 202 CLR 93; 177 ALR 270; (2001) 75 ALJR 442; 46 ATR 228; 2001 ATC 4027; Gleeson CJ, Kirby and Hayne JJ; Gaudron and Gummow JJ dissenting

been established that 'incurred in gaining or producing' is to be understood as meaning incurred 'in the course of' gaining or producing … What is meant by being incurred 'in the course of' gaining or producing income was amplified in Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation *… where it was said that …:*

> *'to come within the initial part of [s 51(1)] it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income.'*"[43]

64. It is true that none of the authorities to which I have referred has concerned a person with a disability. The issue has arisen, though, both before and after the enactment of the DDA. The earlier case is that of *Re Gilbert and Federal Commissioner of Taxation*[44] decided in 1982 by the No. 1 Tax Board of Review (TBR). Mr Gilbert was employed by the Queensland University of Technology (QUT) as a law lecturer. When QUT required him to travel to Darwin to give lectures to external students, his father travelled with him to act as his personal attendant and to assist him from moving from the place where he stayed to the place where he delivered the lectures. The Commissioner rejected Mr Gilbert's claim for a deduction of the expenses he incurred in having his father assist him. There was no question that the trip was made for the purpose of Mr Gilbert's employment. The Chairman of the TBR looked to the "*essential character*" of the expenses claimed; were they related to allowable travelling.[45] Although expressing the greatest sympathy for Mr Gilbert, he felt that the authorities did not permit him to find in his favour. He explained:

> "*In reaching this view I was having regard to the present state of the authorities and to the fact that every traveller needs food and accommodation. Thus I was not dealing with a type of expenditure peculiar to a particular taxpayer or class of taxpayer. On one view the result should not be different even if it is a 'special' type of expenditure provided that it was incurred for the basic purpose of allowable travelling. However there obviously has to be a line drawn for some categories of expenditure are more closely linked than others. For example the cost of employing a nurse to look after a child of a widower so that he may travel or the cost of taking a wife because she won't let him travel without her would not qualify. Such expenditure does not in my opinion lose its essential character of private or domestic outgoings despite the fact that the travelling might trigger the need for it. Similarly for expenses arising out of an unfortunate medical condition.*"[46]

Mr Harrowell and Mr Pape reached the same conclusion saying that to allow the deduction would make the outgoing too remote from what is productive of the assessable income i.e.

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[43] [2001] HCA 3; (2001) 202 CLR 93; 177 ALR 270; (2001) 75 ALJR 442; 46 ATR 228; 2001 ATC 4027 at [9]; 99; 272-273; 444; 230-231; 4029
[44] (1982) 82 ATC 141; Messrs Stevens, Chairman, Harrowell and Pape, Members
[45] (1982) 82 ATC 141 at 142-143
[46] (1982) 82 ATC 141 at 143

the contract of employment. They too thought the essential characteristic of the expenditure was that of a private nature.[47]

65. The case of *Re Frisch and Federal Commissioner of Taxation*[48] (*Frisch*) was decided by Deputy President Block some time after the enactment of the DDA. Ms Frisch was a final year student in Social Science and Law when she was engaged by the New South Wales' Attorney-General's Department (Department) for a period of three months in a temporary position as a summer clerk. The position involved Ms Frisch in using a computer, telephone and other information technology equipment. She had a disability and was permanently confined to a motorised invalid chair for mobility. In addition, she had limited motor skills so that she had limited ability to type, turn pages, find files and arrange her desk. When studying at school and at university, she had dictated her notes, essays, projects and exams to an assistant. That assistant was either a family member or an administrative assistant funded by the family. For the period of her employment with the Department, Ms Frisch engaged an administrative assistant, Ms Hopkins, to type, take dictation, retrieve, move and open files, photocopy documents, arrange the documents on her desk and get her coffee and lunch. Ms Frisch bore all of the costs associated with engaging Ms Hopkins and paid a 9% superannuation levy to an accredited superannuation fund in addition to the hourly rate of remuneration she paid to her.

66. Deputy President Block distinguished between personal services performed for Ms Frisch by Ms Hopkins and those that she performed in assisting Ms Frisch with matters such as typing and filing and the like. The essential character of the expenses Ms Frisch incurred in engaging her administrative assistant were to enable her to carry out her duties as a summer clerk in the Department. It was not, Deputy President Block said:

> "*… a case in which the expense (as, for example, a child-care cost or a travel expense of the nature referred to in* Payne*) was incurred in order to enable the applicant to take up the employment. The non-personal functions were performed … by Ms Hopkins in the offices of the Attorney-General and where Ms Hopkins would have been in close proximity to the applicant. The expense is thus clearly distinguishable from the travel expense incurred in* Payne *and which was incurred in point of time prior to the commencement of the relevant income-earning activity … Accordingly and in my view the non-personal services constituted an expense incurred in order to enable the applicant to carry out her duties and was thus incurred* in *the derivation of the relevant income.*"[49]

67. Deputy President Block explained his view more fully in the following passage when he also considered the position of a person who did not have a disability:

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[47] (1982) 82 ATC 141 at 145
[48] [2008] AATA 462; (2008) 72 ATR 551; 2008 ATC ¶10-031; Deputy President Block
[49] [2008] AATA 462; (2008) 72 ATR 551; 2008 ATC ¶10-031 at [31]; 561; 2413

> " *The cost of clothing is generally non-deductible. A solicitor who acquires a suit for work purposes cannot deduct the cost because the suit can be worn for both private and professional purposes. It is likely that the same principle will generally apply to a number of items required to overcome a disability and where the item in question is required both at work and at home. Items such as spectacles, hearing aids, wheelchairs and crutches spring to mind as examples. But I do not think that the services of Ms Hopkins were akin to crutches; crutches will be required both at home and at work, whereas Ms Hopkins' services by contrast were required and provided (excepting in relation to the personal services) only at and for work. It does not seem to me that the position of the Applicant is different from that of a solicitor who pays someone else to do his typing either because he cannot type himself or prefers not to do so or considers that he can use his time more productively. Excepting only that the disability in this case did not involve any element of choice it does not seem to me that the expense can or should be characterised differently. Ms Hopkins worked for eight hours each day; one hour was taken up by the personal services (clearly private) while the other seven hours were taken up by the non-personal services and without which the Applicant could not fulfil her work obligations. I do not think that the non-personal factors are aptly described as personal or domestic. I accept that an expense incurred to overcome a physical disability will probably in most cases be non-deductible as private or domestic, but this is not a rule which applies invariably.*"[50]

B. The second limb: 8-1(2)(b) and (d)

68. The qualification to s 8-1(1) found in s 8-1(2) is relevant in this case in only two respects. One denies a taxpayer a deduction if the loss or outgoing is of a private or domestic nature. The other raises s 26-30 and denies a taxpayer a deduction if a provision of ITAA97 prevents that deduction. I will consider the first in this part of my reasons.

69. The passages from the two separate reasons for decision given by the TBR in *Gilbert* both conclude that the essential characteristic of Mr Gilbert's expenditure in paying for his father to accompany him was in the nature of private or domestic outgoings. In *Frisch* in 2008, Deputy President Block addressed the same issue in the passage I have set out at [67] above.

70. In *Lodge v Commissioner of Taxation*[51] (*Lodge*), Mason J considered whether Ms Lodge was entitled to a deduction for nursery fees she paid for her infant daughter. She paid those fees when she worked away from home at a solicitor's office. The purpose of the expenditure was to enable her to perform her work and to perform it efficiently at that office. In most instances, she was able to perform her work at home. Her work involved the preparation of bills of costs. Mason J acknowledged that Ms Lodge's purpose in incurring the nursery fees was to earn assessable income and that, in her circumstances, it was an essential prerequisite of the derivation of that income. He continued:

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[50] [2008] AATA 462; (2008) 72 ATR 551; 2008 ATC ¶10-031 at [42]; 563; 2414-2415
[51] [1972] HCA 49; (1972) 128 CLR 171; 3 ATR 254; 46 ALJR 575; 72 ATC 4174

> "*… Nevertheless its character as nursery fees for the appellant's child was neither relevant nor incidental to the preparation of bills of costs, the activities or operations by which the appellant gained or produced assessable income. The expenditure was not incurred in, or in the course of, preparing bills of cost.*"[52]

71. Turning to whether the nursery fees were of a private or domestic nature, Mason J did not attempt to characterise them and then determine whether they were or not. Rather, having found them not to be deductible under s 51(1), he took them to be expenditure of a private or domestic nature. As he said:

> "*However, I should express my view that the expenditure in question was of a 'private or domestic' nature and for that reason is excluded by s 51(1). In so saying I should make it clear that my view is consequential upon the earlier conclusion that the expenditure falls outside the general provisions of s 51(1) and there is accordingly no relevant reason for holding the expenditure to be other than private or domestic expenditure on the care of the appellant's child. I express no opinion on the question of whether an expenditure which is incurred in gaining or producing assessable income may nevertheless be of a 'private or domestic' nature.*"[53]

C. WTPG's claim for deduction: s 8-1

72. I now turn to WTPG's circumstances. On the facts that form the basis of the Commissioner's private ruling, there is no question that he attended conferences and meetings in the United Kingdom as part of the duties of his employment for which he received remuneration. His employer expressly approved his attendance and also met his expenses to do so. There is also no question that WTPG could not have attended the conferences and meetings in the United Kingdom had he not been accompanied by a person who could assist him with standing and walking, using the toilet, showering and bathing and dressing. No staff member was available to assist him and so WTPG's wife undertook the role. WTPG met the expenses of travel himself.

73. Can it be said that the essential characterisation of those expenses is that they were incurred in gaining or producing his assessable income in the sense of being incurred in the course of gaining or producing his assessable income? There is no doubt that WTPG could not have carried out his duties in the United Kingdom had he not been accompanied on the journey there by someone to assist him with his personal needs. There is no doubt that WTPG's wife accompanied him and assisted him with his personal needs only. She did not undertake administrative or other tasks associated with his work while he attended the conferences and various meetings as an employee.

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[52] [1972] HCA 49; (1972) 128 CLR 171; 3 ATR 254; 46 ALJR 575; 72 ATC 4174 at 175-176; 256; 577; 4176
[53] [1972] HCA 49; (1972) 128 CLR 171; 3 ATR 254; 46 ALJR 575; 72 ATC 4174 at 176; 256-257; 577; 4176

74. WTPG's situation reflects that of Ms Frisch in part but not that part which would lead me to conclude that the Travel Expenses he incurred to enable his wife to accompany him are not deductible under s 8-1(1). He did not pay his wife's expenses so that she could carry out tasks associated with his employment so that he could be said to have incurred the expenditure in the course of gaining his assessable income. He incurred those expenses in the course of enabling him to undertake his duties rather than in the course of his undertaking those duties. He is not remunerated by his employer for the efforts he makes to put himself in a position where he can undertake the duties but to undertake the duties of his employment.

75. WTPG's reasons for incurring the expenditure contrasts with Ms Frisch's reasons for engaging Ms Hopkins as an administrative assistant. Ms Hopkins was required to type, take dictation, retrieve, move and open files, photocopy documents, arrange the documents on her desk and so on. All of these were tasks that had to be carried out so that Ms Frisch could perform her duties as a summer clerk in the Department. The nature of her disability meant that she could not perform her duties unless someone performed those tasks for her. Deputy President Block drew a distinction between those tasks and the tasks Ms Hopkins performed in attending to Ms Frisch's personal needs. The former he characterised as having been incurred in the course of gaining or producing her assessable income. The latter, he characterised as expenses of a private or domestic nature and so not deductible. That was so even though those personal needs had to be met if Ms Frisch were to be able to do the work for which the Department remunerated her. The expenses incurred by WTPG are akin to that latter group of expenses and so not deductible.

76. Although I recognise that WTPG's disability does not equate with a person who has a child and must find child care, the analysis is the same. The taxpayer who has a child of a certain age must arrange for another to care for that child in order to put himself or herself in a position where he or she can engage in employment in order to gain or produce assessable income. It can be said that the expense incurred in relation to a taxpayer's putting himself or herself in a position where he or she is able to engage in employment is *connected with*, or a necessary precursor to, gaining or producing assessable income but it cannot be said that it is in *the course of* gaining or producing that assessable income.

77. My conclusion means that WTPG does not satisfy s 8-1(1)(a) of ITAA97. It follows that the expenses are not deductible and I have no need to look to the qualifications in s 8-1(2). Despite that, I will look at the exclusion of a loss or outgoing of a private or domestic nature and whether the expenditure is in that nature. In that regard, I have looked to the nature of the expenses. As Mr Nash acknowledged, WTPG needed his wife to travel with him so that

she could assist him much as Ms Hopkins had assisted Ms Frisch with her purely personal needs as opposed to those that were rendered for the purpose of enabling her to do her work. What distinguished the two, he contended, was the purpose for which those personal services were rendered in each case. WTPG needed assistance for his mobility. Mobility was essential to him in that it enabled him to travel to the conferences and meetings. It equated with Ms Frisch's need for a person to perform the role that legs, hands and fingers play for able-bodied legal clerks and lawyers.

78. As I understand the duties of WTPG's employment, his mobility was not required in order to perform his duties. Beyond his being able to travel to the two conferences and the meetings, WTPG's report of his visits does not suggest that it was required in order for him to deliver his paper at one of the conferences or to attend and participate in the other conference and in the meetings. In this regard, the assistance required by WTPG bears some resemblance to that required by Ms Frisch but not entirely. She needed to be mobile in order to get to her workplace as did WTPG. At her workplace, Ms Frisch required further assistance to carry out her duties. She received that from Ms Hopkins who acted as her legs, hands and fingers. WTPG did not require that assistance to carry out his duties once he was at the workplace which, in this case, was constituted by the two conferences and the meetings.

79. The case of *Frisch* and this are different in their facts but the principles applied by Deputy President Block in that case are no different from those I must apply in this. In *Frisch*, Deputy President Block had evidence that satisfied him that Ms Frisch required her wheelchair both at work and at home. That issue has not been addressed directly in the arrangements on which the Commissioner has made the private ruling. It might be thought that, given the nature of the personal assistance required, it seems inherent in the nature of the assistance described in the arrangement that WTPG requires assistance in Australia and not simply when travelling to the United Kingdom. That equates with their being expenses being of a private or domestic nature.

80. The matter can also be looked at from a different point of view. It is a point of view taken by Mason J in *Lodge* and it proceeds from my earlier conclusion that the expenses incurred by WTPG are not deductible under s 8-1(1). Adopting his Honour's words, my conclusion regarding the expense's having been expenditure of a private or domestic nature is consequential upon my earlier decision that the expenditure has not been incurred in the course of gaining or producing assessable income and so falls outside the general provisions of s 8-1(1).

D. Is this decision made in breach of s 29 of the DDA?

81. I must now test the decision I have made in light of the provisions of s 29 of the DDA to ensure that it does not discriminate against WTPG on the ground of his disability. Section 29 applies equally to me as it does to the Commissioner for we both perform functions or exercise powers under a Commonwealth law. In my case, I have functions and powers under the *Administrative Appeals Tribunal Act 1975* (AAT Act) related to the review of certain administrative decisions. Those decisions include private rulings of the sort made by the Commissioner under Division 359 of Schedule 1 to the TAA in this case. He in making that private ruling and I in reviewing it and, under s 43 of the AAT Act exercising his powers and functions, are both obliged to comply with s 29 of the DDA by not discriminating against WTPG on the ground of his disability.

82. Following the principles established by the High Court in *Fortescue Metals*, albeit in a different context, and *Purvis*, in the context of the DDA, I must first identify the circumstances in which the alleged discrimination is said to have occurred. In doing that, I must keep several things in mind. One is that regard has to be had to the whole legislative and factual context in which the discrimination is said to have arisen. The reasons for reaching the decision in the legislative context as interpreted by the High Court and the Federal Court are part of that context as are those court authorities. What I must then do is to examine what the decision would have been had WTPG not been disabled. Finally, a comparison is made between the two decisions in order to determine whether WTPG's treatment was less favourable and, if so, whether that was because of his disability.

83. I have already set out the context and the reasons for making the decision. At the heart of WTPG's incurring the expense of taking his wife was his need to put himself in a position where he could undertake the travel required of him if he were to attend the conferences and meetings as part of his work. Without his wife, he could not undertake those duties. What would have been the decision had another taxpayer, who was not disabled but who could not travel unless he or she paid another to undertake his or her domestic responsibilities, incurred that expenditure in order to attend the two conferences and the meetings in the same circumstances? The answer is that the taxpayer's claim for a deduction for that expenditure would have been disallowed. The reason for its being disallowed would be the same as the reason for disallowing WTPG's claim for a deduction. In neither case would the expenditure have been incurred in gaining or producing assessable income.

84. WTPG's circumstances cannot be compared with that of the taxpayer who is in the same position as in the previous paragraph but who pays his or her own expenses to attend the conferences and the meetings. Assuming that the taxpayer's attendance at the conferences and the meetings is intended to maintain or increase his or her knowledge, experience or ability in carrying on his or her duties in the course of his or her employment, that taxpayer would be allowed a deduction for the expenses of travelling to and from the conferences and meetings and attending them. On the authorities, that expenditure is incurred in the course of gaining or producing assessable income. That outcome is not discriminatory against WTPG for WTPG's expenses have been paid by his employer and the hypothetical taxpayer has paid his or her own. In both instances, expenditure that enabled WTPG and the hypothetical taxpayer to undertake the travel at all would not be allowed as a deduction. There is no discrimination within the meaning of the DDA in the application of s 8-1 of ITAA97.

ITAA97 and section 26-30

85. In view of the decision that I have made regarding the non-deductibility of the Travel Expenses under s 8-1 of ITAA97, s 26-30 does not arise for consideration. I will, however, consider it for both counsel addressed it in their submissions. Mr Nash submitted that I should take a purposive approach to its interpretation in order to avoid a literal interpretation and a conflict with s 5 of the DDA. Section 26-30 was intended to ensure that expenses incurred for a relative, as a relative, could not be deducted but was never intended to have any application to the expenses incurred by a taxpayer for a relative in relation to tasks carried out as a carer and not as a relative.

86. I agree with both Mr Nash and Mr Flynn that I must take a purposive approach to the interpretation of the provision. That approach was explained by McHugh, Gummow, Kirby and Hayne JJ in their joint judgment *Project Blue Sky Inc v Australian Broadcasting Authority*:[54]

> " *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute ... The meaning of the provision must be determined 'by reference to the language of the instrument as a whole' ... In* Commissioner for Railways (NSW) v Agalianos *..., Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed ...*

[54] [1998] HCA 28; (1998) 194 CLR 355; 72 ALJR 841; 153 ALR 490; McHugh, Gummow, Kirby and Hayne JJ; Brennan CJ dissenting

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals ..."[55]

87. Taking this approach, I note that, unlike the DDA, ITAA97 does not begin with a statement of its objects but those objects are clear. At its heart, the object of ITAA97 is to impose on each individual, company and certain other entities an obligation to pay income tax for each year ending on 30 June (financial year). The amount of that income tax is the taxpayer's taxable income multiplied by the relevant rate of tax imposed under ITAA97 less tax offsets. The taxpayer's taxable income is determined by deducting an amount known as "*deductions*" from the total of the taxpayer's assessable income in the income year which, for an individual, is the same as the financial year. Division 8 of Part 1-3 identifies those amounts that may be deducted in this way. I have already set out ss 8-1(1) and (2). They are concerned with what are known as a "*general deduction*". Other provisions in the ITAA97 also provide for amounts that may be deducted and they are collectively known as a "*specific deduction*". The provisions relating to general and specific deductions must be read in light of Division 26 of Part 2.5 which was inserted by the *Tax Law Improvement Act 1997*[56] (TLI Act). Section 26-1 stated that the Division set out the amounts that a taxpayer cannot deduct and those that cannot be deducted in full.

88. The pattern of ITAA97 clearly indicates that Parliament intended that Division 26 would override the provisions of Division 8. It does that by identifying the nature of the amount claimed as a deduction and/or the circumstances in which it was incurred or paid. If an amount comes within one or other of the descriptors given in Division 26, that Division does not, on its face, leave any room to read into the descriptors other qualifications. In particular, it does not leave room to read into s 26-30 a qualification that a relative's travel expenses will not be deducted in the circumstances it describes unless that relative is caring for the taxpayer. In fact, it is clearly intended to qualify any other provision in ITAA97 so that, if Division 23 applies to an amount, that amount is not deductible even though it would otherwise be deductible as a general or specific deduction.

89. That reading is supported by the explanation given in the Explanatory Memorandum to the *Tax Law Improvement Bill 1996* of what Division 26 would do:

> "*Division 26, which will apply to taxpayers generally, sets out some amounts that taxpayers will not be able to deduct, or not be able to deduct in full. This will be the case even if such amounts could otherwise be deducted under the general deduction provision in section 8-1 of the pending 1996 Act or a specific deduction provision.*"

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[55] [1998] HCA 28; (1998) 194 CLR 355; 72 ALJR 841; 153 ALR 490 at [69]- [70]; 381-382; 855; 509
[56] Act No. 121 of 1997

90. It is further supported by the Commentary appearing later in the Explanatory Memorandum:

> ***Section 26-30 Relative's travel expenses***
>
> *This provision limits the amount that can be deducted for a relative's travel expenses.*
>
> ***Commentary***
>
> *This section will identify more clearly the situations when deductions can be claimed for a relative's travel expenses, rather than, as in section 51AG of the 1936 Act, setting out when such expenses cannot be deducted.*
>
> *…*"

91. It is clear from s 26-30(1) that it is wholly concerned with a loss or outgoing incurred and attributable to the travel of a relative accompanying the taxpayer when the taxpayer is him or herself travelling for the purpose of gaining or producing assessable income. That section imposes a blanket prohibition upon claiming that loss or outgoing as a deduction but it is a prohibition that is ameliorated if the relative performed substantial duties as the taxpayer's employer's employee or as the taxpayer's employee *and* it is reasonable to conclude that the relative would have accompanied the taxpayer even without the personal relationship between them. Parliament has been quite clear in both the terms of its prohibition of the deduction and in the limits of the exception to that prohibition.

92. There is no room to read into s 26-30 an exception if the relative is accompanying the taxpayer as a carer and in the role of carer. If he or she were being employed by the taxpayer to be a carer and performed substantial duties in that role, then it might be that he or she would fall within the first limb of the exception found in s 26-30(2)(a). Whether a relative would fall within the second limb set out in s 26-30(2)(b) might be more difficult to overcome. That requires a finding that it is reasonable to conclude that the relative would still have accompanied the taxpayer even if he or she had not had a personal relationship with the taxpayer.

93. In factual circumstances such as those in *Frisch*, s 26-30 would not arise for Ms Hopkins was an employee but not a relative. The amount found to relate to Ms Frisch's gaining or producing assessable income would continue to be deductible under s 8-1(1)(a) and its deductibility would not be denied under s 26-30(2). Comparing Ms Frisch's circumstances *vis-à-vis* Ms Hopkins and those of WTPG and his spouse and assuming for the moment that WTPG's expenses were deductible under s 8-1(1), which I have found they are not, it might be thought that the legislation discriminates between the two. If it does, it does not discriminate on the basis of disability within the meaning of s 5 of the DDA. What it does is to differentiate between the two situations on the basis of the status of the person providing

the care to the taxpayer who incurs losses or outgoings in order to receive that care in order to gain or produce assessable income.

DECISION

94. For the reasons I have given, I have affirmed the Commissioner's reviewable objection decision dated 9 November 2015.

I certify that the ninety-four preceding paragraphs are a true copy of the reasons for the decision herein of Deputy President S A Forgie.

Signed: …….....[sgd].....
Associate

Date of Hearing	4 October 2016
Date of Decision	30 November 2016
Counsel for the Applicant	Mr P G Nash QC
Counsel for the Respondent	Mr M Flynn QC
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