Cases noted in VeRBosity Volume 11 No 1

Veterans' Review Board

Administrative Appeals Tribunal

Federal Court of Australia

Editor's notes

This edition of *VeRBosity* contains reports on all Federal Court decisions relating to veterans' matters handed down in the four month period from 1 January 1995 to 30 April 1995. During that period, the Court handed down five decisions on matters which were previously heard by the Board.

Stafford raises the important jurisdictional issue of whether the AAT has the power to review issues of entitlement which have been decided by the Repatriation Commission but not reviewed by the VRB. The case of *Nicholson* involves the issue of whether the AAT correctly applied the "reasonable hypothesis" standard of proof provisions in section 120 of the *Veterans' Entitlements Act 1986.*

Chambers and *Servos* both involve appeals on issues relating to eligibility for Special rate pension. *Tosswill* is concerned with the issue of whether the AAT provided procedural fairness to the applicant in circumstances where pension was reduced from the Intermediate rate.

This edition also includes reports on selected Board and Tribunal decisions handed down in the same period.

Robert Kennedy
Editor

Selected Decisions of the Veterans' Review Board

Entitlement - torn left medial meniscus - exercise - defence service

N94/1930

Malcolm, Cross & Millbourn

19 January 1995

The member applied to the Board for review of a decision of the Repatriation Commission that his torn left medial meniscus was not defence-caused.

The member commenced service in the Royal Australian Air Force on 11 March 1991 and was still a serving member of the Forces. The whole of his service constituted defence service as defined in the *Veterans' Entitlements Act 1986* and, as he had completed 3 years continuous full-time service prior to 7 April 1994, he was eligible to be considered under the *VE Act.*

The Board noted that in respect of the member's defence service, subsection 120(4) of the Act applies. Therefore, the Board was required to decide all relevant matters to its reasonable satisfaction. This meant that for the claim to succeed, the Board had to be satisfied that it was more probable than not that his torn left medial meniscus was defence-caused.

The applicant contended that he injured his knee while engaging in defence related physical exercise. He explained that the injury had taken place during a Thursday physical training period. He said it was his choice to go for a run that morning but it was during working hours and at a time allocated for physical exercise. He noted the well known requirements to meet a level of fitness as part of his Defence Force requirements. He also explained that Monday and Thursday mornings were allotted time for exercise.

The Board said that it was aware of the requirements for members of the Forces to maintain fitness during their service life. The question to be decided in this case was whether the member could be said to be on '*defence service*' at the time of the injury. A member of the Forces will not be on defence service if the injury or disease claimed was the result of incidents or circumstances relating solely to his personal or domestic sphere.

In *Holthouse v Repatriation Commission* 1 RPD 287, a decision of the Federal Court of 7 April 1982, Davies J said that the law recognised a distinction between matters which are of a 'purely personal or private nature and matters which have a connection with employment'. His Honour quoted Denning J (as he then was) in *Wedderspoon v Minister of Pensions* [1947] 1 KB 562:-

> "The cases show that when the cause of the death or disablement lies in the man's own personal or domestic sphere, and the war service does no more than provide the circumstances in which the cause operated, it is not attributable to war service."

The facts in Mr Holthouse's case revolved around the question of whether removing his potted palm from one place of residence to another caused injury to his back. Davies J said that the possession and moving of the potted palm was a matter which lay within the sphere of Mr Holthouse's personal life and the Defence Force had no concern as to whether he maintained a potted palm or not.

The term '*defence service*' was considered by the Administrative Appeals Tribunal in *Re Repatriation Commission and Wicking* (1987) 7 AAR 289. The Tribunal stated:-

> "So defined, 'defence service' is apt to describe the overall service in which the member is or was engaged. It is not however, as is the word 'employment', apt to describe the nature of the service in question or to state what are its incidents. The service of a member of the Defence Force is continuous and full-time notwithstanding that he is not on duty 24 hours a day. A member who satisfies the requirement of 'continuous full-time service' may be injured while skiing at Thredbo while on weekend stand-down. The member would however be as much involved in his personal life while skiing as was the mover of the potted palm in *Holthouse v Repatriation Commission* (1982) 1 Repatriation Commission Decisions 287. The resultant incapacity could hardly be said to have arisen out of, or been attributable to, any incident of the member's defence service. ..."

Board's conclusion

The Board found that the applicant was on defence service while he was exercising as required for that day's duties. The exercise he was taking could not be said to be related to his private or domestic sphere since it was undertaken as part of his required fitness program. Although members had a choice as to what exercise they took, they did not have a choice as to whether or not they engaged in exercise. The Board was satisfied that the member's knee injury was defence-caused.

Formal decision

The Board set aside the decision under review and substituted its decision that the member's torn left medial meniscus was defence-caused.

War Widow's pension - carcinoma - pancreas - smoking

V93/0418

Parker, Logan & Mildren

15 March 1995

The applicant applied to the Board for review of a decision that her husband's death, on 9 July 1991 at the age of 66 years, was not war-caused. The cause of death was certified to be bronchopneumonia - 2 days and metastatic adenocarcinoma of unknown primary - 2 months.

The veteran served in the Royal Australian Air Force from 26 February 1943 to 23 January 1946. He served overseas and in Australia and this constitutes eligible war service including operational service as defined in the *VE Act*.

The advocate submitted that the material before the Board raised a reasonable hypothesis of connection between the veteran's death and his service and that the opinion of Dr Woodruff supported the proposition that the primary site of the carcinoma was most likely in the pancreas.

The Board noted that the standard of proof to be applied in determining questions of diagnosis or existence or otherwise of an injury or disease was considered by Beazley J in the case of *Preston v Repatriation Commission* decided on 10 September 1993. After

considering the reasoning of the judges in the High Court case of *Bushell v Repatriation Commission* 175 CLR 408, Beazley J decided that the Administrative Appeals Tribunal was wrong in applying subsection 120(4) of the Act to determine the question and decided that the standard of proof contained in subsection 120(1) was the appropriate test.

Translating the effect of that decision to the facts of the present case, the Board said that it did not have to be reasonably satisfied whether the primary site of the cancer was in the pancreas, but must determine that it was in the pancreas unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination.

In his report of 11 January 1995, Dr Woodruff said:

> "I stated that the clinical features (CT demonstration of a mass in the head of the pancreas, ascites and multiple hepatic metastases) were consistent with a diagnosis of carcinoma of the pancreas. In addition, the pathologist's report concluded 'although a primary site cannot be definitely established from this biopsy, the pattern of the tumour suggests origin from pancreas or bile duct'."

Dr Woodruff had previously excluded as the primary site a number of other areas and noted in the report referred to that there were no clinical features to suggest a primary carcinoma of the lung.

The Board said that after analysing the material, and particularly the report of Dr Woodruff referred to above, it was not satisfied beyond reasonable doubt that the primary site was not in the pancreas. It therefore found that the primary site of the carcinoma was in the pancreas.

The advocate further submitted that there was a connection between a smoking habit of at least 5 pack years and carcinoma of the pancreas.

The Board said that it was satisfied that there was material, in the form of the Statement of Principle 02-02 (issued by the Repatriation Commission), raising a reasonable hypothesis of connection between a smoking habit of at least 5 pack years and carcinoma of the pancreas. The Statement of Principle represented a summary of previous medical opinion and, although not binding on the Board in this case, the Board accepted the statement as sufficient material raising the hypothesis.

The Board noted the contrary opinion expressed by Dr Woodruff concerning the connection between smoking and carcinoma of the pancreas. However, the Board referred to the statements by the High Court in *Bushell's* case that:

> "Conflict with other medical opinions is not sufficient to reject a hypothesis as unreasonable."

and

> "It is vital that the Commission keep in mind that that hypothesis may still be reasonable although it is unproved and opposed to the weight of informed opinion."

Board's conclusion

The Board said that the fact that Dr Woodruff does not support the connection between smoking and carcinoma of the pancreas was not

sufficient for the Board to reject the hypothesis.

The Board continued:

"Turning to a consideration of the facts supporting the hypothesis, the Board notes that the evidence in relation to the date of the commencement of the veteran's smoking habit is contradictory. In December 1942 and some 2 months prior to him joining the Air Force, the veteran wrote, in answer to the question 'Habits - smoking', the word 'Yes'. The veteran's wife, in the smoking questionnaire dated 27 March 1992 stated that her husband commenced smoking during his service with the RAAF and that his mother had told her that he had not smoked before enlistment.

At the hearing the Board asked the widow to describe the circumstances of the conversation with the veteran's mother and she told the Board that the conversation had taken place when she was engaged to marry her husband and his mother was having a discussion with her about her son. She stated that his mother described him as a 'good boy' but that she did not like him smoking. The veteran's mother said that he had not smoked before he went away, meaning, quite clearly to her, that he had not smoked before he joined the Air Force.

The widow stated that she could never remember having any conversation with her husband about when he had started to smoke although she did try on a number of occasions to make him stop or reduce the habit."

The Board was satisfied that the veteran's mother was not aware that he smoked prior to joining the Air Force. As he lived at home with her (he was an only child and his father had died prior to his birth) any smoking which he did must have been very light. Also, the Board noted that the veteran had been away from school for less than 2 years and, having regard to the fact that he was only 18 years of age when he joined the Air Force, the Board was satisfied that he would not have formed any smoking habit at that stage.

Taking all the evidence into account, the Board was not satisfied beyond reasonable doubt that the veteran did not commence a smoking habit during his service.

In relation to the question of the cause of the veteran commencing a smoking habit, the Board was satisfied, having regard to the stressful service which he underwent, that his service would have been a factor in the commencement of this habit.

Formal decision

The Board set aside the decision under review and substituted its decision that the veteran's death was war-caused.

Assessment - whether service related incapacity alone - paying hobby - breeding finches

N93/2566

Marsh, Thompson & Millbourn

3 April 1995

The veteran applied to the Board for review of a decision refusing an increase in pension for service related incapacity beyond 100% of the General rate.

The veteran was born on 2 December 1922 and on the application day was 70 years of age.

The veteran was seeking pension at the Special rate as provided for in section 24 of the *VE Act*.

The Board noted that in order to qualify for pension at either the Intermediate or Special rate, the veteran was required to satisfy the relevant criteria during the assessment period commencing on 3 June 1993.

The advocate submitted that at that date, the veteran would have been undertaking remunerative activity as a commercial breeder of finches if he were free of service related incapacity. The veteran had described the circumstances in which he ceased his bird breeding as follows:

> "Roughly around 1970 I suffered a nervous breakdown (war service disability) and was off work for almost a year, leaving me very nervous and with the 'shakes'. Over the years these 'shakes' gradually worsened until about 1980 and my retirement from Telecom. I was forced to sell all my birds and most cages because I could not feed and water the birds without spilling the seed and water, was unable to catch the birds, without damaging them, even quite often killing them."

He told the Board that he was medically retired from his employment as a storeman at Telecom in 1980 due to a work related back injury and ceased bird breeding in 1981. At that time he was earning approximately $1500 per annum from the sale of finches. He told the Board that while he was employed at Telecom he made enquiries at the Taxation Office as to the status of the income received from breeding and selling finches and was informed that he did not have to declare such income as it was a "paying hobby".

The Board said that there is no question that the veteran ceased his full-time employment at Telecom in 1980 at the age of 59 years as a consequence of non-war service related incapacity, that being his back condition. He told the Board that his superannuation payments precluded the grant of a Service Pension. The advocate submitted that the veteran was precluded by his anxiety state and associated tremor from continuing his remunerative activity of finch breeding. He considered that the third test within section 24 did not require that the veteran be prevented from undertaking remunerative activity by reason of service related incapacity alone.

The advocate referred the Board to a report by Dr Baz which stated:

> "In my opinion, in June 1993, the veteran was rendered unfit for work of eight hours or more duration weekly as a consequence of his accepted disabilities.
>
> In my opinion the veteran's other disabilities, his low back condition and cardiorespiratory disease would limit him to work of less than twenty hours weekly in the areas in which he is experienced."

The Board noted that earlier within her report, Dr Baz stated that the veteran has lost ¾ range of movement in his cervical spine and ¼ range in his thoraco-lumbar spine. The Board said that that problem clearly affected his ability to continue working at Telecom and was not satisfied that it played no role in his cessation of finch breeding. That cessation was closely linked in time with his cessation of employment at Telecom.

As to the submission by the advocate that the veteran could still pass the third

test within section 24 notwithstanding that other than war service related incapacity affected his ability to undertake remunerative activity, the Board was guided by the following analysis of Fox J in *Starcevich v Repatriation Commission* (1987) 7 AAR 296 at 299.

> "It is clear that the words 'by reason thereof' link the limbs together and that par (c), read with subs (2), imposes a test which so far as here relevant requires three conditions to be satisfied:
>
> (i) The veteran being prevented from continuing to undertake remunerative work that he was undertaking;
>
> (ii) Condition (i) (above) being by reason alone of the incapacity, from war-caused injury or war-caused disease (to which par 24(1)(b) relates);
>
> (iii) By reason of condition (i) above, the veteran suffering a loss of salary or wages or earnings on his or her own account."

Later at p.301 his Honour said:

> "It seems to me that the intention of par 24(1)(c) is that the applicant must have suffered substantial loss of remuneration consequent alone upon the incapacity referred to in pars 24(1)(a) and (b). The loss must be real, in the sense that the applicant cannot rely upon any remunerative work that he has undertaken in the past, but it would be unnecessarily restrictive to assess the loss by reference only to the last remunerative work undertaken before the applicant's inability to work became complete. In my opinion, a veteran's entitlement to a pension under s 24 may be based on his being prevented from continuing to undertake substantial remunerative work that he has undertaken in the past, even if that work was followed by work of a different type before the veteran ceased work altogether. In such circumstances, the passage of time from the cessation of the work upon which reliance is placed to the veteran's complete retirement may mean that the other requirement of par 24(1)(c), namely that the veteran's war-caused injury or disease alone prevents him from undertaking the remunerative work upon which his claim is based, is not satisfied, but this is a different matter, and one which does not arise here."

The Board further noted that the Federal Court has consistently held that if non-service related incapacity contributes to a veteran's preclusion from remunerative activity, he cannot satisfy the third part of section 24. The Board found that the veteran was precluded from continuing to breed finches due to a combination of service and non-service related disability. In addition, the Board was not reasonably satisfied that he in fact lost the ability to engage in remunerative activity that he had not already lost when he left Telecom. The nature of the moneys received in his finch breeding activities was, in the Board's opinion, no more than a 'paying hobby' as the Taxation Office described it. The Board found that the veteran's employment at Telecom would have ceased upon attaining the age of 65 years. Although he had aspired to enlarge his bird breeding activities, he ceased breeding birds soon after retirement. The Board was reinforced in its conclusion in this matter by the Second Reading speech introducing the *Repatriation Legislation*

Amendment Bill 1985, in which the Minister explained the objects of the legislation as follows:

> "Since 1920, there has been a special rate of disability pension payable in circumstances where, because of total and permanent incapacity resulting from war service, a veteran has been unable to resume or to continue in civil employment. The Special or T & PI rate pension was designed for severely disabled veterans of a relatively young age who could never go back to work and could never hope to support themselves or their families or put away money for their old age. It was never intended that the T & PI rate would become payable to a veteran who, having enjoyed a full working life after war service, then retires from work possibly with whatever superannuation or other retirement benefits are available to the Australian workforce.
>
> Determining authorities have found the application of the present legislative provisions difficult because the provisions, unchanged since 1920, contain outmoded and imprecise terms. The amendments clarify the eligibility criteria and make it clear that, to qualify for a T & PI pension, a veteran must be eligible for the 100% general rate pension [Ed: now 70%]. In addition, the T & PI rate pension can become payable only when a veteran is totally and permanently disabled by accepted disabilities and is thereby precluded from continuing to engage in remunerative work. If a person has had the usual span of a working life or has retired voluntarily or has left employment for reasons other than accepted disabilities, a T & PI pension is not payable. It would be in only very rare cases that any veteran beyond the normal retirement age could be eligible for this pension. Special provision is made by the Bill to cover veterans who are under age 65 years of age, are unemployed, and are genuinely seeking to engage in remunerative work."

The Board was reasonably satisfied that the veteran was not entitled to pension at either the Special rate or Intermediate rate. The Board was also satisfied that the veteran was not entitled to payment of the Extreme Disablement Adjustment.

Formal decision

The Board affirmed the decision under review to continue the veteran's pension at 100% of the General rate.

Selected Decisions of the Administrative Appeals Tribunal

Death in motor vehicle accident - war-caused knee injury

Re S A Pamment and Repatriation Commission
Lewis & Hooper

P92/476 19 Jan 1995

Mrs Pamment applied for review of a decision that the death of her late husband was not war-caused. Mr Pamment had a number of war-caused disabilities including ligamentous injury right knee. It was claimed on behalf of Mrs Pamment that because of his limited mobility arising from his knee injury, he was unable to move out of the path of a car which crashed into his house and as a result he was killed.

Mr Pamment served in the Army during World War 2. He was stationed in the Torres Strait Islands from October 1942 to December 1943. The Tribunal had earlier determined that he had operational service only on 19 June 1943 when there was a Japanese air raid on Horn Island, and that the remainder of his service was non-operational. The matter was required to be determined pursuant to subsection 120(4) of the *VE Act*, that is, the Tribunal had to be reasonably satisfied that the veteran's death was related to his war service.

The circumstances of Mr Pamment's death were that on 16 July 1990, a car mounted the footpath outside his home, demolished part of a timber paling fence and continued its path into the back room of the house where it stopped. The veteran was emptying a fish tank located in a glassed-in verandah and was killed as a result of a piece of glass piercing his skull.

Mrs Pamment told the Tribunal that her late husband would have been facing the fish tank when syphoning water out and cleaning the tank. She believed that the noise of the car crashing through the fence would have alerted the veteran. She said that the vehicle would have been slightly to his right and that the large window which was shattered by the car would have been behind him.

Medical evidence

Dr M Sheps, the veteran's treating doctor, attended the scene of the accident and told the Tribunal that only a slight movement of the head would have avoided the shard of glass which killed the veteran. Dr Sheps said that the veteran had reasonably normal ambulation except during flare-ups when his mobility was more limited. Dr Sheps considered that the veteran's knee injury significantly affected his mobility.

Referring to the decision of the Full Federal Court in *Treloar v Australian Telecommunications Commission* (1990) 97 ALR 321, the Tribunal said that it was required to consider whether the veteran's knee condition added in some measure to his death. The Tribunal noted that the Full Court said that the causal connection must be established on the probabilities and not left in the area of possibility or conjecture.

Tribunal's conclusion

The Tribunal concluded as follows:

"The Tribunal finds that, on the balance of probabilities, the veteran was working at the fish tank just before the vehicle entered his property. We also find that he suffered from some restrictions in his mobility, albeit minimal, as a result of his knee disability. Given that the fish tank was on top of the vehicle and that there was no direct impact of the vehicle to the body of the deceased veteran, we find that the veteran's mobility was sufficient to move out of the path of the oncoming vehicle. However, he was killed by a shard of glass and not by the vehicle directly. In order for the matter to succeed it is necessary for the Tribunal to find that the veteran was unable to move out of the way of the shard of glass because of his limited mobility related to his knee condition. Dr Sheps noted that a slight change in the position of the veteran's head was all that was necessary in order to avoid the head injury which caused his death. The Tribunal finds on the evidence that the veteran's limited mobility was not of necessity a factor in his moving his head slightly. He could have moved his head without moving his lower limbs. However, the central issue for the Tribunal is the apparent randomness of the path of the shard of glass from a very large window when hit by a vehicle with some obvious force. We find that the veteran probably had auditory warning of the vehicle crashing through his fence. Even if the veteran had visual warning of the vehicle coming towards him, and even if he took evasive action to move out of the direct path of the vehicle, which on the evidence we find he did, nevertheless we find that he had virtually no time to identify the precise direction of the shard of glass in order to avoid being hit by it. Whether the glass hit him or missed him was, we find, a matter of chance.

On all the evidence we cannot be reasonably satisfied that any of the veteran's war-caused disabilities contributed in any way to his fatal injury."

Formal decision

The Tribunal affirmed the decision that the veteran's death was not war-caused.

Eligible service - not allotted for duty

Re J Robinson and Repatriation Commission
Dwyer & Campbell

V92/45 30 Jan 1995

Mr Robinson applied for review of a decision that he was not a "veteran" in terms of the *VE Act*. The Tribunal was required to determine whether he had rendered operational service. The two periods of service relied on were:

1. service at the Ubon Air Base in Thailand commencing in July 1967; and
2. a visit from Ubon to Saigon in South Vietnam said to have been for a period of three days for the purpose of giving intelligence to "command" in Saigon.

(There was no record of a visit by Mr Robinson to Saigon in his service documents.)

Section 5C of the *VE Act* defines a veteran, so far as relevant, as follows:

*" **'veteran'** means:*

(a) a person ... :

(i) who is, because of section 7, taken to have rendered eligible war service; ..."

Section 7(1) provides, as to eligible war service:

"Subject to sub-section (2), for the purposes of this Act

(a) a person who has rendered operational service shall be taken to have been rendering eligible war service while the person was rendering operational service; ..."

The term "operational service" is defined in section 6 of the *VE Act.* Section 6(1)(e) provides:

"a person who has, as a member of the Defence Force, rendered continuous full-time service outside Australia:

(i) as a member of a unit of the Defence Force that was allotted for duty; or

(ii) as a person who was allotted for duty,

in an operational area ..., shall be taken to have been rendering operational service during the period in which the person or the unit was so allotted for duty; ..."

Section 5B defines 'operational area' as:

"(1) In this Act, unless the contrary intention appears:

***'operational area'** means an area described in column 1 of Schedule 2 during the period specified in column 2 of Schedule 2 opposite to the description of the area in column 1; "*

The Tribunal noted that Ubon in Thailand is not included in column 1 of Schedule 2 and therefore found that Mr Robinson's period of service at Ubon in 1967 was not operational service.

The Tribunal said that service in Saigon was service in an operational area but because of section 6(1)(e), it was only operational service if the person rendered such service as:

"a person who has, as a member of the Defence Force, rendered continuous full-time service outside Australia:

(i) as a member of a unit of the Defence Force that was allotted for duty; or

(ii) as a person who was allotted for duty."

Section 5B defines 'allotted for duty' as:

*"(2) A reference in this Act to a person, or a unit of the Defence Force, that was **allotted for duty** in an operational area is a reference:*

(a) in the case of duty that was carried out in an operational area described in item ... 4, ... of Schedule 2 (in column 1) - to a person, or unit of the Defence Force, that is allotted for duty in the area (whether retrospectively or otherwise) by written instrument issued by the Defence Force for use by the Commission in determining a person's eligibility for entitlements under this Act; or

...

(c) to a person, or unit of the Defence Force, that is, by written instrument signed by the Minister for Defence, taken to have been allotted for duty in an operational area described in item 4 ... in Schedule 2 (in column 1)."

The Tribunal said that there was no evidence that Mr Robinson or his unit were allotted for duty in the operational area described in item 4 of Schedule 2. The Tribunal concluded that Mr Robinson was not a "veteran" in terms of section 5C of the *VE Act*.

Formal decision

The Tribunal affirmed the decision under review.

Diverticular disease of colon - war-caused irritable bowel syndrome

Re B P Reen and Repatriation Commission
Gibbs, Argent & Sutherland

V94/75 31 Jan 1995

Mr Reen applied to the Tribunal for review of a decision that his diverticular disease of the colon was not war-caused. The Repatriation Commission accepted that his irritable bowel syndrome was war-caused.

Mr Reen served in the Australian Army during World War 2, with service in New Guinea and Bougainville. He rendered operational service and his claim for pension was required to be considered in terms of the "reasonable hypothesis" standard of proof in subsections 120(1) and (3) of the *VE Act*. Those subsections were considered by the High Court in the cases of *Bushell* (1992) and *Byrnes* (1993). He told the Tribunal that during his army service in 1942, he suffered from dysentery and diarrhoea. Since that time, he had experienced three to five bowel motions per day. His diverticular disease of the colon was diagnosed in 1988.

Medical evidence

Professor G Kune, consultant surgeon, gave evidence on behalf of Mr Reen. Professor Kune was of the opinion that Mr Reen's bowel symptoms commenced with bouts of what appeared to be infective gastroenteritis, causing diarrhoea which lasted for an unusually long period of time and it was very likely that the infective gastroenteritis was the trigger for irritable colon syndrome. Professor Kune referred to medical research which suggested that irritable bowel syndrome may lead to diverticular disease. This was based on six factors:

1. That the symptoms of the two conditions are clinically not distinguishable.
2. There is a significant age difference between those who have only irritable bowel syndrome and those with symptomatic diverticular disease.
3. Studies of pressure within the bowel show similar abnormalities in both conditions.
4. Irritable bowel syndrome is common in developed Western countries where diverticular disease is also common.
5. US research findings of the incidence of both conditions.
6. Abnormal peristalsis in patients with irritable bowel syndrome.

Professor Kune acknowledged that it is possible for both conditions to develop quite separately.

Associate Professor J Lambert , a gastroenterologist, agreed that diverticular disease is more prevalent among the elderly. He said that the

onset of irritable bowel syndrome, on the other hand, can occur at a much younger age. However, many people with irritable bowel syndrome do not develop diverticular disease. As to Professor Kune's evidence concerning abnormality in the way bowel contents are propulsed and the build up of muscle segment, thus weakening the walt of the bowel and producing a diverticulum, Professor Lambert said that most patients with irritable bowel syndrome are not found to have specific abnormalities of intraluminal pressure. He said that most physicians, surgeons and researchers would agree that increased intraluminal pressure which occurs in a local segment of the bowel, is associated with pressure such that a small diverticulum does form. He accepted that a progression from irritable bowel syndrome to diverticular disease could not be ruled out.

Tribunal's conclusion

The Repatriation Commission submitted that the hypothesis put forward in support of Mr Reen was not reasonable in that it was not supported by any scientific facts. The Tribunal rejected this submission, saying:

> "It is our view, firstly, that Professor Kune is a medical practitioner who is eminent in the field of knowledge relevant to this matter. Secondly, we are of the view that the material before us, in particular the written and oral evidence of Professor Kune, gives rise to a hypothesis which is reasonable, namely that Mr Reen's diverticular disease of the colon is causally related to his war-caused disease irritable bowel syndrome, and hence arose out of or was attributable to his eligible war service pursuant to section 9 of the Act. While we have taken careful note of Associate Professor Lambert's evidence it is our view that his evidence cannot be said to have demonstrated the hypothesis to be contrary to known scientific facts, or that it is obviously fanciful or untenable. We are of the further view that none of the facts necessary to support the hypothesis is disproved beyond reasonable doubt. The facts concerned are essentially those to which we have referred in addressing the evidence of Professor Kune. Finally, it is our view that there are no facts which can be said to be inconsistent with the hypothesis raised by the material before us."

Formal decision

The Tribunal decided that the veteran's diverticular disease of the colon was war-caused.

Jurisdiction - application for review

Re B A Mitchell and Repatriation Commission

Lewis

N94/730 13 Feb 1995

Mr Mitchell lodged an application to the Administrative Appeals Tribunal for review of a VRB decision on 26 August 1994. Notification of the VRB decision was dated 13 May 1994 but Mr Mitchell claimed that the notice was sent to the wrong address and that he did not receive it until 1 June 1994. He claimed that his application to the AAT was therefore lodged within the three month time limit and that he was not required to apply an extension of time.

Mr Mitchell's application to the VRB was signed by him and showed his street

number as 2/15. He told the AAT that although he had signed the VRB application, it was completed for him by an advocate and that he did not read it in detail before signing it. His actual street number, as shown on later correspondence with the VRB, was 2/13. All VRB correspondence was sent to 2/15 and there was evidence that he received such correspondence without apparent delay.

The Tribunal said:

> "From the evidence it would appear that the VRB did not change the applicant's address on its records and the notice of the VRB decision was sent some months later to the incorrect address. There was evidence that the incorrect address used by the VRB did not result in the applicant not receiving correspondence from the VRB on other occasions, nor did there appear to be delays in the receipt of communications from the VRB previously. However, the applicant's evidence and that of his wife was that the VRB decision was not received by him until 1 June 1994. He provided evidence of a date stamp of 1 June 1994 which he said he put on the letter on the day it was received. Both the applicant and his wife in evidence stated that it was the applicant's practice always to date stamp letters which he received and to date stamp copies of letters which he despatched. He said he did this with all of his personal mail and this was corroborated by his wife's evidence. It was also the evidence of the applicant and his wife that he received a copy of the tape recording of the VRB proceedings on the same day he received the decision; the copy of the tape recording was received in a separate envelope. The tape was sent to him following his wife's request for this during her evidence given to the VRB. However, documentary evidence from the VRB is that the tape was requested by Brian Mitchell on 18 May 1994 and despatched on 30 May 1994."

Submission

It was submitted that notice of the VRB decision was not served on Mr Mitchell by pre-paid post to his last known address. Therefore, the VRB decision was not properly served on the veteran in terms of section 28A(1) of the *Acts Interpretation Act 1901* which provides:

> *"**28A.**(1) For the purposes of any Act that requires or permits a document to be served on a person, whether the expression **'serve'**, **'give'** or **'send'** or any other expression is used, then, unless the contrary intention appears, the document may be served:*
>
> *(a) on a natural person:*
>
> *(i) by delivering it to the person personally; or*
>
> *(ii) by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or ..."*

Section 3(4) of the *AAT Act* provides that a document is deemed to be furnished to a person if it is posted to the person by pre-paid letter to the address provided by the applicant, and:

> *"**3.**(4)(b) a document or statement so posted shall be deemed to have been furnished, and a notice or other notification so posted shall be deemed to have been served or given, unless the contrary is proved, at the time when the document, statement or*

notice or other notification would have been delivered in the ordinary course of post."

The AAT concluded as follows:

"While there was some inconsistency between evidence from the VRB and the evidence from the applicant and his wife which in other circumstances the Tribunal would seek to resolve by taking further evidence, I believe it is not necessary to resolve the inconsistencies, nor is it necessary to make any findings as to the date on which the applicant was notified of the decision under review. I hasten to add that leaving this factual issue unresolved in no way leaves an inference of lack of credibility of the applicant and his wife.

The Tribunal's decision turns on the fact that the decision of the VRB was not posted to the applicant to the address he provided ... which was the address he included in his pro forma communication on 23 February 1994. The Tribunal makes no other findings of fact on the evidence before it. As the applicant was not properly notified of the VRB decision, his application to this Tribunal is deemed to be in time."

Formal decision

The Tribunal decided that Mr Mitchell's application lodged on 26 August 1994 was within time.

Eligible service - whether domiciled in Australia

Re J Stott and Repatriation Commission

Barbour

N94/987 13 Feb 1995

The issue before the Tribunal in this case was whether Mr James Stott was a "veteran" as defined in section 6 of the *Veterans' Entitlements Act 1986*. As relevant to this case, section 6 provides:

"6.(1) For the purposes of this Act:

...

(g) subject to sub-section (2), a person who has rendered continuous full-time service as a member of the naval, military or air forces of a Commonwealth country or an allied country in an operational area shall be taken to have been rendering operational service while the person was so rendering continuous full-time service;

...

(2) Paragraph (1) (f) or (g) does not apply to any service rendered by a person as a member of the naval, military or air forces of a Commonwealth country or an allied country unless the person has satisfied the Commission, whether before or after the commencement of this Act, that the person was domiciled in Australia or an external Territory immediately before the person's appointment or enlistment in those forces."

Under section 5(1) of the *Domicile Act 1982*, a person's domicile prior to the enactment of that Act (1 July 1982) is to be determined as if it had not been enacted, that is, by resort to common law.

James Stott was born on 11 March 1924. In May 1937, at the age of 13 years, he joined the Royal Naval Reserve as a cadet midshipman, and was employed aboard *HMS Worcester*. After his father died in October 1937, his uncle, Victor Stott assumed responsibility for his welfare although was not officially appointed as his

guardian. Victor Stott returned to Australia from England and James Stott visited him in 1938 (for five weeks) and in 1939 (for three weeks) at a rented apartment at Potts Point, Sydney. On the second occasion, a bank account was established in James Stott's name, and he was given use of his uncle's post office box. James Stott completed his cadetship in 1940 and joined the Union Castle Steamship Company of London and Cape Town as a Junior Deck Officer. In 1942, at the age of 18, James Stott joined the Royal Navy. He was married in 1945 and later sailed to Australia, arriving in February 1948. His mother died in the 1960's, having remained in England from the time of her husband's death.

Submissions

It was submitted on Mr Stott's behalf that the Tribunal should find that he had acquired the domicile of his uncle, Victor Stott, when his uncle became his guardian after his mother had "abandoned" him. It was submitted that the common law provided that the applicant's uncle, as his "natural guardian", had the power to change his domicile. It was not contended that he had made Australia his "domicile of choice". It was submitted that the *Veterans' Entitlements Act* should be beneficially interpreted so as to allow the applicant to be regarded as a "veteran".

Domicile of choice

The Tribunal said:

> "At common law, a person is incapable of having a domicile of choice while a minor (*Halsbury's Laws of Australia*, paragraph 85-200). In 1942, the relevant time, a person was a minor until they had reached the age of 21 years. I would therefore find that the applicant was unable, immediately prior to his enlistment at the age of 18 years, to have acquired a domicile of choice.
>
> Even if I accept that a person is no longer a minor upon turning 18 years of age, from that time until his enlistment Mr Stott did not have the coincidence of lawful presence and intention to remain for an indefinite period that are required for Australia to have become his domicile of choice; see *Miller v Teale* (1954) 92 CLR 406. Hence he had not acquired Australian domicile immediately before his enlistment in the Royal Navy."

Domicile of dependence

The Tribunal said that prior to the death of his father, James Stott's domicile was dependent upon his father's domicile. The evidence before the Tribunal supported a finding that his father and mother were both domiciled in the United Kingdom.

The Tribunal concluded as follows:

> "On the death of his father, James Stott's domicile either remained that of his father's (see *Conflicts of Laws in Australia*), or became that of his mother's (see *Pottinger v Wightman* [1814-23] All ER 788), only to be alterable when he reached majority. Either way, the applicant was domiciled in the United Kingdom.
>
> Even if I accept that Victor Stott became the applicant's guardian, which I do not, I would not find that James Stott's domicile followed his uncle's domicile; see *Conflicts of Laws in Australia* and *Potter v Minahan* (1908) 7 CLR 277.

Finally, I cannot be reasonably satisfied that, in 1937, or between then and 1942, Victor Stott was domiciled in Australia. ... Therefore, even if I were to accept that Victor Stott was the applicant's guardian, and that therefore James Stott's domicile became dependent upon his uncle's, I would still not find that the applicant was domiciled in Australia immediately prior to his enlistment, because I am not satisfied that his uncle was so domiciled."

Formal decision

The Tribunal affirmed the decision that James Stott was not a "veteran" as defined in section 6.

Decisions of the Federal Court of Australia

Jurisdiction of AAT - issues of entitlement not reviewed by VRB - whether operational service

Stafford v Repatriation Commission
Northrop J

13 February 1995

The Court heard an appeal from a decision of the Administrative Appeals Tribunal that it did not have jurisdiction to review a decision of the Repatriation Commission on issues of entitlement which were not reviewed by the Veterans' Review Board. The Court also heard a second ground of appeal on the issue of whether the veteran had rendered operational service.

Background

In 1989, Mr Stafford lodged a claim for disability pension in respect of chronic obstructive airways disease, osteoarthritis of knees and hips, otitis externa and high blood pressure. On 8 October 1990, a delegate of the Repatriation Commission determined that his osteoarthritis hips and knees and otitis externa were not war-caused and refused his claim in respect of chronic obstructive airways disease and high blood pressure on the basis that he was not suffering from an injury or disease as defined in section 5 of the *VE Act*.

By application dated 14 January 1991, the veteran applied to the VRB to review the delegate's decision. In the application form, the veteran described the decision to be reviewed as "*Rejection of claim for disability pension*" made by the delegate on 8 October 1990, notice of which was received by the veteran on 24 October 1990.

Northrop J said:

> "This made it clear that the whole of the decision by the delegate was made the subject of the application for review by the Veterans' Review Board."

In setting out reasons for lodging the application for review and in subsequent correspondence with the VRB, the veteran referred only to problems with his hips and knees and ear trouble. The VRB therefore treated the application as being limited to those conditions.

The VRB heard the application in the veteran's absence at his request. On 8 August 1991, the VRB published its decision in the following terms:

> "Decision under review:
>
> The Repatriation Commission decision of 8 October 1990 which determined that osteoarthritis hips and knees and otitis externa are not war-caused.
>
> Decision of the Board:
>
> On 8 August 1991 the Veterans' Review Board decided to affirm the decision under review."

The Board's decision made no reference to the delegate's refusal of the veteran's claim in respect of chronic obstructive airways disease and high blood pressure.

Jurisdictional issue

The Repatriation Commission claimed that there were two grounds on which the Court had no jurisdiction to hear

and determine the appeal. The first ground was based on the principles enunciated by the Full Court in *Director-General of Social Services* v *Chaney* (1980) 31 ALR 571. In *Chaney's* case, the Court held, by majority, that an appeal may only be brought under subsection 44(1) of the *AAT Act* in respect of a decision of the Tribunal which constitutes the effective decision or determination of the application for review and not in respect of a preliminary ruling by the Tribunal as to whether it has jurisdiction. Exceptions to this general approach were, however, to be found in the appeal provided specifically by subsection 44(2); the case where the proceeding before the Tribunal can properly be divided into two or more separate parts in respect of which independent "decisions" may properly be given; and where the Tribunal has held that it has no jurisdiction to deal with the subject matter. In the last situation, the Tribunal would have effectively disposed of the proceeding before it.

Northrop J was uncertain as to what "decision" was sought to be reviewed by the Tribunal in this case. His Honour inferred that the application for review was with respect to one decision given by the delegate which included two issues. Northrop J said:

> "The Veterans' Review Board, wrongly, reviewed part only of that decision and then affirmed the whole of the decision of the delegate of the Repatriation Commission but in a way which perpetuated the earlier error. The application for review by the Tribunal, in all probability, was the decision made by the delegate of the Repatriation Commission. This enabled the Tribunal to decide the second issue as a preliminary question."

Northrop J held that *Chaney's* case was not binding, having regard to the facts of this particular case, in that the issue of jurisdiction had been determined by the Tribunal against the interests of the applicant. His Honour said that it was undesirable that a "decision" on interlocutory matters should be decided in such a way as to enable an appeal to be taken with respect to a part of the decision and not another part. Therefore, the whole of the decision of the Tribunal should be the subject of the appeal to prevent the possibility of two separate reviews being undertaken by the Tribunal when it was appropriate that all matters should be heard together.

The second ground raised by the Commission was based on the proper construction of subsection 175(1) of the *VE Act* and subsections 25(1) and (4) of the *AAT Act*. This ground was based on the nature of the "decision" of the delegate. Section 175 provides for review of "the decision of the Commission". Northrop J said that the Board had apparently misstated the decision of the delegate with the result that the Board reviewed part only of the decision of the Commission.

The Commission asserted that the delegate had made four decisions, one decision with respect to each of the four diseases.

Northrop J rejected the arguments put by the Commission, saying:

> "The application to the Veterans' Review Board was for a review of one decision, namely the 'Rejection of claim for disability pension'. The Review Board should have reviewed the one decision. It did not do so. It reviewed part only of that decision but in adopting that course, it is

impermissible for the Commission to claim now that the Tribunal has no jurisdiction to review the decision of the Delegate of the Repatriation Commission because the Review Board had not reviewed part of the matters forming the basis of the decision of the Commission. It would be a strange result if a veteran could be deprived of a right of review by the Tribunal where the Review Board failed to consider parts of the decision being reviewed by it but nevertheless affirmed the decision of the Commission. A veteran should not be compelled to recommence the process seeking a pension in order to have that matter proceed from the Commission, to the Review Board and to the Tribunal.

In reaching its decision on the second issue, the Tribunal concluded that the veteran had not sought to have the 'decision' of the Delegate of the Commission in relation to the diseases of chronic obstructive airways disease and high blood pressure reviewed by the Review Board. The Tribunal concluded also that the veteran was concerned to have reviewed only the disabilities which were in fact reviewed and that the other disabilities were not considered by the Board as it was not requested to do so and that the Board did not receive any evidence on those disabilities.

In coming to these conclusions, the Tribunal was in error. ... Further, it must be remembered that the Board conducted the Review on the material before the Commission. Neither the veteran nor the Commission appeared before the Board so it is not surprising that the Board was not requested to receive other evidence. Under the provisions of the *Veterans' Entitlements Act* it was required to consider at least all the material that was before the Commission, see subsections 139(1) and (2). It did not do that. It was in error in not doing that. The whole of the decision of the Delegate was to be reviewed by the Board. It affirmed the decision under review, but wrongly attempted to limit the material it was required to review. This error cannot be used to support a submission that the whole or part of the decision of the Commission had not been affirmed by the Board in the terms of paragraph 175(1)(a) and thus to limit the scope of review by the Tribunal."

The Court set aside the decision of the Tribunal that it did not have jurisdiction to review the decision of the Repatriation Commission in respect of chronic obstructive airways disease and high blood pressure.

Operational service

The Court also heard an appeal on the issue of whether the veteran had operational service as defined in section 6 of the *VE Act*. The Court concluded that the Tribunal had correctly applied the principles enunciated by the Court in *Repatriation Commission* v *Kohn* (1989) 5 *VeRBosity* 108 and that there was no error of law by the Tribunal on this issue.

Formal decision

The Court allowed the appeal in part and :

1. set aside the Tribunal's decision that it did not have jurisdiction to review issues of entitlement decided by the Repatriation Commission but not reviewed by VRB, and

2. remitted the matter to the Tribunal for hearing and determination according to law.

[Ed: The Repatriation Commission appealed to the Full Federal Court. The Full Federal Court's decision will be reported in the next edition.]

Reasonable hypothesis - failure to adopt correct reasoning process

Repatriation Commission v Nicholson

Gummow J

17 February 1995

This was an appeal to the Federal Court on a question of law against a decision of the Administrative Appeals Tribunal that the death of Mr Nicholson was war-caused. Mr Nicholson served in the RAAF during World War 2 and rendered operational service in the European theatre. (An earlier decision of the AAT was set aside by the Court - see 9 *VeRBosity* 32.)

The Repatriation Commission submitted that the AAT had made an error of law in relation to the standard of proof contained in section 120 of the *VE Act*. It was also submitted that the AAT erred, in failing to give reasons for its decision, contrary to section 43 of the *AAT Act*.

Gummow J noted that although the AAT in the decision under appeal had made reference to the High Court's decision in *Bymes* v *Repatriation Commission* (9 *VeRBosity* 83) it had failed to adopt the correct methodology for applying section 120 of the *VE Act*. In *Bymes*, the High Court said that subsection 120(3) of the Act is to be applied first and that this requires consideration of whether the "whole of the material" raises a reasonable hypothesis connecting the veteran's injury, disease or death with war service. Subsection 120(1) is applied only if a reasonable hypothesis is established.

The Repatriation Commission submitted that the AAT had failed to apply the two subsections in the correct order. The Commission submitted that the AAT fell into error by regarding its acceptance of the hypothesis relied upon as concluding the matter before it and in failing to go on to apply subsection (1). It was further submitted that in failing to apply subsection (1), the AAT did not consider whether one or more of the facts necessary to support the hypothesis were disproved beyond reasonable doubt, or whether the truth of another fact in the material, inconsistent with the hypothesis, was proved beyond reasonable doubt.

Background

Mr Nicholson had suffered from asthma for many years prior to his death. On the death certificate, cardiac respiratory failure was listed as the disease or condition "directly leading to death" and acute myocardial infarction was identified as a morbid condition giving rise to the stated disease or condition directly leading to death. Asthma was described as a significant condition contributing to death but not related to the disease or condition causing death.

The hypothesis put forward at the AAT was that the war-caused asthma materially contributed to or accelerated the condition directly leading to the veteran's death, namely, cardio-respiratory failure. After considering the medical evidence, the AAT had, in effect, found that facts gave rise to a reasonable hypothesis connecting the death of Mr Nicholson with war service. The Commission submitted that the

AAT had not gone on to consider subsection 120(1). The Commission submitted that if the AAT had considered the application of subsection 120(1), it would have been necessary for it to consider whether one of the facts necessary to support the hypothesis, namely the occurrence of an asthma attack (not merely the existence of an asthma condition) was disproved beyond reasonable doubt, and that there was no real indication that the AAT had engaged in such an exercise.

Gummow J accepted the Commission's submissions, saying:

> "In my view, there was a significant error of law in the approach taken by the AAT, and it would be wrong for the Court in an 'appeal' under section 44 of the *AAT Act* itself to venture upon the resolution of the questions presented by subsection 120(1) in the light of the material before the AAT. The defects in the method adopted by the AAT in dealing with the matter before it cannot properly be described as formal or immaterial."

Formal decision

The Court allowed the appeal and set aside the decision of the AAT. The matter was remitted to the AAT to be reheard in accordance with law.

Special rate eligibility - whether Court can consider fresh evidence

Servos v Repatriation Commission

Spender J

17 March 1995

This was an appeal under section 44 of the *Administrative Appeals Tribunal Act 1975* against a decision of the Tribunal refusing pension at the Special rate. The essential issue was whether at the date of the AAT's determination on 27 April 1994, Mr Servos satisfied the provisions of section 24(1)(c) of the *VE Act*, that is:

> *"the veteran is, by reason of incapacity from that war-caused injury or war-caused disease, or both, alone, prevented from continuing to undertake remunerative work that the veteran was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own account, that the veteran would not be suffering if the veteran were free of that incapacity."*

Background

Mr Servos served in the RAAF from 1944 to 1946 and in the Army from 1946 to 1976. After his discharge, he worked at the Australian Taxation Office until 12 July 1990. He was then aged 64 years and would have been entitled to continue working there until his 65th birthday. He has a number of war-caused disabilities and is assessed at one hundred percent of the General rate. His most recent application for increase in pension was lodged on 25 June 1992, when he was 65 years of age.

Mr Servos told the AAT that he had planned to work in a private capacity for many years after ceasing work with the Australian Taxation Office and claimed that he was prevented from working by his war-caused incapacity. The AAT decided that he was not prevented from continuing to undertake remunerative work by reason of incapacity from war-caused injury or disease alone. The AAT said that there were other factors preventing him from working such as age, the requirement for him to

undertake a compulsory training course before starting new employment in the taxation field and the reluctance of his son to become involved in a proposed courier business.

Issues before court

The three questions to be decided by the Court were as follows:

1. whether, and to what extent, an applicant for review pursuant to section 44 of the *AAT Act* can adduce evidence which was not before the Tribunal at the time of its decision;

2. whether the provisions of sections 24(1)(a), 24(1)(b) and 24(1)(c) are to be read disjunctively or as cumulative requirements, all of which have to be satisfied; and

3. whether Mr Servos satisfied section 24(1)(c) and was therefore entitled to the Special rate.

Further evidence

In relation to the first question, Mr Servos sought to introduce additional material on appeal to the Court which was not before the AAT. The first concerned the extent to which applicants for a Special rate of pension had been granted that rate. The effect of the material was to suggest that of those satisfying the requirement in section 24(1)(a), namely, a degree of incapacity in excess of 70%, only a small percentage, said to be 5.48%, had been granted a pension at the Special rate. The second body of evidence which was sought to be put before the Court concerned medical reports and statements by lay witnesses concerning Mr Servos and his medical condition.

Spender J noted that the appeal to the Court was limited to questions of law. In exercising its original jurisdiction under section 19 of the *Federal Court of Australia Act 1976*, the Court did not have the power to receive fresh evidence of the type which was sought to be adduced in this case. Spender J said:

> "As section 44 of the *Administrative Appeals Tribunal Act* makes plain, only questions of law are to be considered at the Federal Court level. The policy of the legislation in my opinion is to make the decision of the Tribunal final on questions of fact. It is inconsistent with that policy to seek to adduce evidence before the Federal Court for the consideration of the Court on an application pursuant to section 44 of the Act, the object of which is to invite the Court to disagree with a factual conclusion reached by that Tribunal.
>
> In my opinion ... the jurisdiction of the Federal Court of Australia pursuant to section 44 of the *Administrative Appeals Tribunal Act* does not permit the reception of further evidence which was not before the Administrative Appeals Tribunal."

Application of *VE Act*, section 24(1)

In relation to the second question, it was submitted on behalf of Mr Servos that an assessment of at least 70% incapacity from war-caused injury or disease was sufficient, of itself, to entitle a veteran to the Special rate. It was claimed that in the absence of a conjunctive "and" between sections 24(1)(a) and 24(1)(b) as it appeared in the legislation prior to amendment in 1994, the requirements of sections 24(1)(a), 24(1)(b) and 24(1)(c) were not to be read as cumulative requirements.

Spender J rejected this submission, saying:

> "In my opinion, on a proper construction of section 24 of the Act, before a veteran is entitled to a Special rate of pension, it had to be demonstrated that either of the requirements of section 24(1)(a) existed and, in addition, both sections (1)(b) and 24(1)(c) were met by the veteran."

***VE Act*, section 24(1)(c)**

The third question before the Court was whether it was open to the Tribunal to conclude that Mr Servos did not come within section 24(1)(c). Spender J noted that the case as conducted before the Tribunal focussed on the reasons for Mr Servos ceasing working for the Australian Taxation Office, and also as to the reasons why he did not undertake work for Income Tax Professionals, and also for the reason why he did not undertake the courier business which had been referred to by him as one of the possibilities for his post-Australian Taxation Office employment.

Spender J said:

> "In my opinion, it was open for the Tribunal to conclude on the material before it that the reason for his ceasing working for the Australian Taxation Office was not solely caused by his health. I think also that it was open to the Tribunal to conclude that the failure by Mr Servos to commence employment with Income Tax Professionals was due in part to factors of his age and the requirement for a longish course of instruction. The courier trucking business did not eventuate because of the reluctance of the son of Mr Servos to supply his driving skills to that business."

Spender J concluded that there was no legal error on the part of the Tribunal.

Formal decision

The Court dismissed the appeal.

Special rate - fitness for low stress manual work - *VE Act* s 28

Chambers v Repatriation Commission

Davies, Moore & Sackville JJ

22 March 1995

This was an appeal against a decision of a single judge (See *10 VeRBosity 58*). In that decision, Whitlam J had dismissed an appeal by Mr Chambers against a decision of the Tribunal that he was not entitled to a pension at the Special rate. There was evidence before the Tribunal that the veteran was 45 years of age and was a physically active person who ran up to 10 km per day, swam and went for long bike rides.

Whitlam J rejected a submission that section 28(a) of the *VE Act*, on its correct construction, did not permit any consideration to be given to the appellant's physical fitness or his ability to perform manual labour in determining whether he was incapable of remunerative work. The appellant's argument was that the adjectives "vocational, trade and professional" modified the nouns "skills, qualifications and experience". Thus, so it was said, the only skills, qualifications and experience that could be relevant were those acquired in or for the purposes of employment. They did not include manual labour or "mere physical aptness" for work.

Whitlam J considered that the language of section 28(a) bore a wider meaning. The expression "vocational

qualifications", in his view, was appropriate to encompass a person's physical fitness. There was nothing in section 28 which required the fitness to be acquired as the result of attendance at a school of physical culture or in an exercise program at work. Furthermore, his Honour considered that the Tribunal clearly had regard to all of the appellant's skills, qualifications and experience in considering under section 28(b) the kind of remunerative work he might undertake.

Legislation

Section 28 of the *VE Act* provides, so far as relevant:

> ***28.*** *In determining, for the purposes of paragraph ... 24 (1) (b), whether a veteran who is incapacitated from war-caused injury or war-caused disease, or both, is incapable of undertaking remunerative work, ... the Commission shall have regard to the following matters only:*
>
> *(a) the vocational, trade and professional skills, qualifications and experience of the veteran;*
>
> *(b) the kinds of remunerative work which a person with the skills, qualifications and experience referred to in paragraph (a) might reasonably undertake; and*
>
> *(c) the degree to which the physical or mental impairment of the veteran as a result of the injury or disease, or both, has reduced his or her capacity to undertake the kinds of remunerative work referred to in paragraph (b).*

Submission to Full Court

It was submitted on behalf of Mr Chambers that the Tribunal had made two errors of law. First, it was argued that the Tribunal had failed to have regard to certain matters that must be taken into account under section 28 of the *VE Act*, in assessing whether a veteran is incapable of undertaking remunerative work. Secondly, it was argued that the Tribunal and Whitlam J erred in their construction of section 28, in that each held that it was permissible to consider the appellant's physical ability to undertake "low stress manual employment". It was contended that section 28, on its proper construction, permitted a veteran's ability to undertake work to be taken into account only if that ability was related to the veteran's past training or experience. Physical aptitude for work, if unrelated to past training or experience, could not be considered.

Full Court's decision

Referring to previous authorities, the Full Court rejected the applicant's submissions and held that section 28(a) of the *VE Act* is not to be interpreted in a narrow sense. The Full Court said that it was clear that not all veterans would have unskilled manual work within their range of possible employment. However, where a finding was made that a veteran might reasonably undertake manual work, it did not matter that the veteran's physical fitness or aptitude was not related to his previous work history or formal training. Moore and Sackville JJ said:

> "On the approach we have taken, not necessarily all the attributes of a particular veteran will be taken into account in determining the available opportunities for remunerative work. We doubt that a veteran who has no special skills, qualifications or experience relevant to a specialised occupation could be regarded as capable of undertaking remunerative work in that occupation, simply because he or she is intelligent

enough to undertake the extensive retraining necessary to acquire the skills or qualifications required for employment. Such a person would not have the appropriate skills or qualifications to be able to obtain remunerative work in that field. As *Defence Force Authority v House* shows, a veteran may have skills and qualifications for remunerative work of a particular kind, even though some new learning or certification, involving a relatively small increment on existing skills and qualifications, is required. And it follows from what we have said that, where a veteran has the skills and qualifications necessary to undertake remunerative work in a particular field, those skills and qualifications can - indeed must - be taken into account, even though they were acquired independently of and were never utilised in the veteran's previous employment or training programs."

The Full Court also rejected the applicant's submission that the Tribunal had failed to have regard to all matters required to be taken into account under section 28.

Formal decision

The Full Court dismissed the appeal.

Reduction in pension - procedural fairness - correct test to be applied

Tosswill v Repatriation Commission
Olney J

24 April 1995

Mr Tosswill appealed to the Federal Court against a decision of the AAT which affirmed a decision of the Repatriation Commission to reduce his pension. He was originally granted pension at the Intermediate rate in 1983 under the former *Repatriation Act 1920* on the basis that he was then unable to engage in remunerative work except on a part-time basis or intermittently. On 1 May 1992, the Repatriation Commission decided to reduce his pension from the Intermediate rate to 100 per cent of the General rate with effect from 7 January 1983, the original date of grant. That decision was affirmed on review by the VRB and the AAT.

There was evidence before the Court that when the veteran applied for a service pension in April 1982, he stated that he was not currently employed, nor was he self employed, having retired from a public accountancy practice. In a medical report dated 31 March 1983, the veteran stated that he had been a public accountant and had retired in December 1981. The same report referred to him doing consultancy work and work for country clients. On 29 April 1983, the veteran stated that he had sold his accountancy practice 16 months earlier and that he casually consulted for the new partners.

Legislation

The powers of the Repatriation Commission to review decisions previously made by it are contained in sections 24A and 31 of the *VE Act.* Those sections provide, as relevant:

> *"**24A.** Where the Commonwealth is or becomes liable to pay a pension to a veteran at the rate applicable under section 23 or 24, that rate continues, while a pension continues to be payable to the veteran, to apply to the veteran unless:*
>
> *(a) the decision to apply that rate of pension to the veteran would not have*

been made but for a false statement or misrepresentation made by a person;

(b) in the case of a veteran to whom section 23 applies:

(i) the veteran is undertaking or is capable of undertaking remunerative work of a particular kind for 50% or more of the time (excluding overtime) ordinarily worked by persons engaged in work of that kind on a full time basis; or

(ii) in a case where subparagraph (i) is inapplicable to the work which the veteran is undertaking or is capable of undertaking - the veteran is undertaking or is capable of undertaking that work for 20 or more hours per week; or

(c) ...

31.(6) *Where the Commission is satisfied that:*

(a) having regard to any matter that affects the payment of a pension or attendant allowance, being a matter that was not before the Commission, the Board or the Administrative Appeals Tribunal, as the case requires, when the decision to grant the pension or attendant allowance, or a decision to vary the rate of the pension or attendant allowance, was made;

(b) by reason of a refusal or failure of any person to comply with a provision of this Act;

(c) by reason of a refusal or failure of a veteran to comply with a notice served on the veteran under subsection (5A) or with a request made under paragraph 32(1)(c); or

(d) by reason of the circumstances referred to in a paragraph of section 24A being applicable to the veteran;

in a case to which paragraph (a), (b) or (c) applies, a pension or attendant allowance should be cancelled or suspended or is being paid at a higher rate than it should be or, in a case to which paragraph (d) applies, a pension is being paid at a higher rate than it should be, the Commission may, by determination in writing, cancel or suspend or decrease the rate of the pension or attendant allowance, or decrease the rate of the pension, as the case may be, with effect, subject to subsection (7), from the day on which the determination was made or such later day as is specified in the determination.

(7) *Where a determination is made under subsection (6):*

(aa) by reason of the Commission having regard to a matter that affects the payment of a pension or attendant allowance in the circumstances specified in paragraph (6)(a); or

(a) by reason of the refusal or failure of a person to comply with a provision of this Act, other than:

(i) subsection 127 (4) in relation to a notice under paragraph 127 (1) (f); or

(ii) subsection 128 (4); or

(b) by reason that an amount has been paid by way of pension or attendant allowance that, but for the false statement or misrepresentation of any person, would not have been paid;

a date earlier than the date of the determination may be specified in the determination as the date as from which the cancellation, suspension or decrease, as the case may be, is to take effect."

Tribunal's findings

The Tribunal found that Mr Tosswill was not prevented from earning a living wage by reason of his war-caused incapacity, but that he had made a deliberate decision to reduce his workload and obtain remuneration by a combination of the service pension, disability pension and such accounting work as he wished to undertake. The Tribunal also found that he had deliberately misrepresented his position in documents he forwarded to the Department of Veterans' Affairs and at the medical examination in 1983 in order to give the impression that he had fully retired from his accountancy practice.

The Tribunal concluded that the veteran's inability to undertake remunerative work was not caused by war-caused incapacity alone; that he had not at any stage qualified for the grant of pension at the Intermediate rate; and that the initial grant of pension would not have been made but for misrepresentation by the veteran.

Legal issues

It was submitted that the Tribunal had failed to afford procedural fairness to the veteran before making its findings and that it had adopted the wrong test when considering whether the decision in 1983 to grant pension at the Intermediate rate would not have been made but for a false statement or misrepresentation.

Procedural fairness

The Court referred to correspondence between the parties at the Tribunal as to the basis on which the veteran's pension was reduced to 100 per cent. The Court said:

> "It is clear from the exchange of correspondence between the parties and from the reference to the respondent's reply to the applicant's request for particulars in the Tribunal's reasons, that the Tribunal proceeding was contested on the basis that it was not part of the respondent's case that the decision to apply the Intermediate rate of pension to the applicant would not have been made but for a false statement or misrepresentation made by the applicant (ss 24A(a), 31(6)(d)) but rather, the respondent's case was that, having regard to any matter that affects the payment of the pension, being a matter that was not before the respondent when the decision to grant the pension was made, the pension was being paid at a higher rate than it should be (s 31(6)(a))."

The Court considered that having regard to the circumstances, there had been no failure to afford procedural fairness to the veteran. The Court said:

> "In the facts of this case there seems to be little to distinguish between a suggestion that the applicant had not provided his correct employment details and a suggestion that he had made a misleading statement. It would have made no difference at all to the preparation of the applicant's case if the respondent's particulars had indicated that s 31(6)(d) was relied upon rather than s 31(6)(a). In these circumstances I do not think that there was any failure to afford the applicant procedural fairness in the Tribunal dealing with the application on the basis that it did."

Test applied by Tribunal

The Court said that the essential issue to be addressed was whether the

decision to assess pension at the Intermediate rate would not have been made but for a false statement or misrepresentation. The Court said:

> "The finding that the applicant recommenced practice sometime in 1982 does not establish that his statement made in April 1982 that he was then not employed or self employed was either false or misleading, nor does the fact that in the year ending June 1983 the applicant earned gross fees of $9,500 have that effect. The latter finding is not inconsistent with what the applicant apparently told the two examining doctors in March and April 1983, namely that he had retired from his former practice and that he was doing a limited amount of work."

The Court concluded that the Tribunal had failed to address the essential issue of whether the decision-maker in 1983 would not have made the decision but for a false statement or misrepresentation by the veteran. The Court said that the Tribunal had directed its attention to events which occurred after September 1983 and that there was no evidence to justify the conclusion of the Tribunal in this case. In the circumstances, the Tribunal should have found that there was no basis to justify the decision to cancel the veteran's pension at the Intermediate rate.

Formal decision

The Court set aside the Tribunal's decision and substituted its decision that the Commission's decision cancelling pension at the Intermediate rate be set aside.

Administrative Appeals Tribunal decisions - January to April 1995

Carcinoma

melanoma
- 12 months service in NT at age of 30 years

Prater, B I 21 Apr 1995

Non-Hodgkin's lymphoma
- exposure to ultraviolet radiation
- smoking

Fergus, W C 13 Mar 1995

Cardiovascular disease

coronary artery disease
- anxiety and stress
- cessation of smoking

Hooper, I R 31 Jan 1995

coronary artery disease
- stress

Haynes, M J 3 Feb 1995

myocardial infarction
- whether contributed to or accelerated by asthma

Nicholson, E M 27 Mar 1995

Death

electrocution
- whether death due to war-caused disabilities

Parbery, M F 07 Feb 1995

motor vehicle accident
- whether death due to war-caused knee injury

Pamment, S A 19 Jan 1995

Dental condition

dental caries
- whether related to war service

Miller, D R 07 Apr 1995

Disability pension

defence service
- eye injury while off duty
- whether defence-caused

Burns, R W 07 Apr 1995

degenerative lumbar spondylosis and haemorrhoids
- whether war-caused

Frost, L J 12 Apr 1995

Eligible service

whether a veteran
- not allotted for duty

Robinson, J 30 Jan 1995

whether a veteran
- whether domiciled in Australia

Stott, J 13 Feb 1995

Gastrointestinal disorder

diverticular disease of colon
- whether related to war-caused irritable bowel syndrome

Reen, B P 31 Jan 1995

General rate pension

assessment of carcinoma kidney
- whether assessment can include effects of carcinoma
- incisional hernia and anxiety disorder

Riley, A T 2 Feb 1995

assessment of occupational asthma

Darch, R S 17 Feb 1995

Guide to Assessment (1994) (GARP)
- emotional and behavioural

Thurgar, K D 22 Mar 1995

Jurisdiction

whether application for review lodged within time
- VRB decision not sent to last known address

Mitchell, B A 13 Feb 1995

Remunerative work

whether prevented by war-caused disabilities alone
- tremor from non war-caused disability

Coulthard, R E 23 Jan 1995

whether prevented by war-caused disabilities alone
- farm work prevented in part by non war-caused disability

McCallum, R D 20 Jan 1995

whether prevented by war-caused disabilities alone
- insurance broker

McLean, L M 31 Jan 1995

whether prevented by war-caused disabilities alone
- retired from Telecom aged 58
- intended to return to farm work

Russell, W R 7 Jan 1995

whether prevented by war-caused disabilities alone
- motor repair business

Walker, J H 08 Feb 1995

whether prevented by war-caused disabilities alone
- fitter aged 75 years

Sheehy, M B 21 Apr 1995

whether loss of earnings
- accountancy work

Jones, B C 05 Apr 1995

whether totally & permanently incapacitated

Mitchell, A P 19 Apr 1995

Spinal disorder

lumbar spondylosis and spondylilisthesis

Bennetts, L J 14 Feb 1995

Travelling to or from place of duty

motor cycle accident
- uncertainty as to time of accident

Scott, T R 14 Feb 1995

DEEMED ALLOTMENT IN VIETNAMESE WATERS

Under an instrument of the Minister for Defence made on 22 May 1986, certain RAN ships involved in transporting troops to and from South Vietnam, and on other support duties, were deemed to have been allotted for duty during periods when those ships were present in the operational area. The operational area of Vietnamese waters extended out to sea for a distance of 161 kilometres. Details of movements of those ships to and from the operational area in Vietnam are set out on the following pages.

In the case of *Repatriation Commission v Hawkins* (22 September 1993), the Full Federal Court decided that a person whose unit is deemed to have been allotted in terms of section 5(12)(b) is to be treated as if they had a normal allotment for duty under the provisions of the *VE Act* (see 9 VeRBosity 70).

Members of units of the Defence Force who were deemed to have been allotted by the Minister's instrument are required to be treated as if they were allotted in the normal manner. In normal cases, the operational service of a person in an operational area extends from the last port of call in Australia to the first port of call on return to Australia (section 6(5)).

In some cases of deemed allotment, operational service does not extend from the last port of call in Australia to the first port of call on return. Where the ship was outside Australia, the Minister's instrument may allot the ship from when the ship entered the operational area, or from an earlier date. Operational service in those circumstances ends when the unit or person:

- is deployed to another area outside Australia (on the day on which the ship leaves the operational area, or reaches another area outside Australia); or

- returns to Australia (on the day on which the ship reaches the first port of call in Australia).

Robert Kennedy
Editor

SHIPS DEEMED TO HAVE BEEN ALLOTTED FOR DUTY IN VIETNAMESE WATERS UNDER SECTION 5(12)(b) OF THE VETERANS' ENTITLEMENTS ACT 1986

SHIP	LAST PORT OF CALL / DUTY	IN PORT VIETNAM	FIRST PORT OF CALL / DUTY
ANZAC	Sydney 20 May 68	1 Jun 68	Darwin 7 Jun 68
BOONAROO	Cairns 13 Mar 67	28 Mar - 2 Apr 67	Darwin 13 Apr 67
DERWENT	Manila 26 May 66	6-8 Jun 66	Singapore 13 Jun 66
	Singapore 10 Feb 69	15 Feb 69	Singapore 18 Feb 69
	Singapore 4 Nov 71	6 Nov 71	Singapore 8 Nov 71
DUCHESS	Sydney 27 May 65	8-11 Jun 65	Fremantle 26 Jun 65
	Manus Is 20 Sep 65	28-30 Sep 65	Hong Kong 3 Oct 65
	Singapore 18 Nov 68	20 Nov 68	Hong Kong 25 Nov 68
	Sydney 16 Nov 69	28 Nov 69	Singapore 29 Nov 69
	Singapore 3 Apr 71	5 Apr 71	Hong Kong 8 Apr 71
	Singapore 17 May 71	22-23 May 71	Hong Kong 1 Jun 71
JEPARIT (MV)	Sydney 11 Mar 67	27 Mar - 4 Apr 67	Sydney 21 Apr 67
(Naval personnel only)	Sydney 28 Apr 67	12-16 May 67	Sydney 2 Jun 67
	Sydney 9 Jun 67	24 Jun-2 Jul 67	Sydney 18 Jul 67
	Sydney 27 Jul 67	11-18 Aug 67	Sydney 4 Sep 67
	Sydney 13 Sep 67	27 Sep-5 Oct 67	Sydney 22 Oct 67
	Sydney 30 Oct 67	13-22 Nov 67	Sydney 9 Dec 67
	Sydney 18 Dec 67	2-11 Jan 68	Newcastle 27 Jan 68
	Sydney 9 Feb 68	24-27 Feb 68	Sydney 14 Mar 68
	Sydney 23 Mar 68	6-15 Apr 68	Sydney 1 May 68
	Sydney 10 May 68	24-29 May 68	Sydney 15 Jun 68
	Sydney 21 Jun 68	5-11 Jul 68	Sydney 28 Jul 68
	Sydney 6 Aug 68	21-27 Aug 68	Sydney 13 Sep 68
	Sydney 22 Sep 68	7-12 Oct 68	Sydney 29 Oct 68
	Sydney 4 Nov 68	19-25 Nov 68	Sydney 17 Dec 68
	Sydney 28 Dec 68	12-19 Jan 69	Sydney 5 Feb 69
	Sydney 14 Mar 69	29 Mar-3 Apr 69	Sydney 19 Apr 69
	Sydney 24 Apr 69	8-12 May 69	Sydney 29 May 69
	Newcastle 4 Jun 69	19-23 Jun 69	Sydney 10 Jul 69
	Sydney 16 Jul 69	30 Jul-6 Aug 69	Sydney 25 Aug 69
	Sydney 7 Sep 69	24-29 Sep 69	Sydney 13 Oct 69
	Sydney 22 Oct 69	9-13 Nov 69	Sydney 29 Nov 69
JEPARIT (HMAS)	Sydney 19 Dec 69	4-10 Jan 70	Sydney 26 Jan 70
	Darwin 16 Feb 70	25 Feb-3 Mar 70	Sydney 21 Mar 70
	Sydney 26 Mar 70	13-18 Apr 70	Sydney 6 May 70
	Sydney 16 May 70	8-13 Jun 70	Sydney 28 Jun 70
	Sydney 6 Jul 70	22-27 Jul 70	Sydney 12 Aug 70

Deemed allotment in Vietnamese waters

SHIP	LAST PORT OF CALL / DUTY	IN PORT VIETNAM	FIRST PORT OF CALL / DUTY
JEPARIT (HMAS) (cont)	Sydney 18 Aug 70	4-7 Sep 70	Sydney 23 Sep 70
	Sydney 1 Oct 70	21-25 Oct 70	Sydney 8 Nov 70
	Sydney 15 Nov 70	3-8 Dec 70	Sydney 23 Dec 70
	Sydney 4 Jan 71	21-24 Jan 71	Sydney 8 Feb 71
	Sydney 16 Feb 71	8-12 Mar 71	Sydney 26 Mar 71
	Sydney 2 Apr 71	19-22 Apr 71	Sydney 5 May 71
	Sydney 13 May 71	30 May-2 Jun 71	Sydney 26 Jun 71
	Townsville 7 Jul 71	21-25 Jul 71	Townsville 8 Aug 71
	Sydney 20 Aug 71	8-15 Sep 71	Sydney 30 Sep 71
	Sydney 11 Oct 71	29 Oct-3 Nov 71	Townsville 14 Nov 71
	Sydney 25 Nov 71	13-18 Dec 71	Brisbane 31 Dec 71
	Sydney 10 Jan 72	3-6 Feb 72	Sydney 11 Mar 72
MELBOURNE [1]	Subic Bay 31 May 65	7-8 Jun 65	Sydney 22 Jun 65
	Singapore 25 Apr 66	3-4 May 66	Hong Kong 6 May 66
	Manila 25 May 66	6 Jun 66	Penang 9 Jun 66
PARRAMATTA	Tawau 25 May 65	8-11 Jun 65	Singapore 22 Jun 65
	Singapore 5 Apr 68	9 Apr 68	Singapore 15 Apr 68
	Bangkok 15 May 71	22 May 71	Subic Bay 24 May 71
QUEENBOROUGH	Hong Kong 27 Jan 63	31 Jan-4 Feb 63	Singapore 6 Feb 63
QUIBERON	Hong Kong 27 Jan 63	31 Jan-4 Feb 63	Singapore 6 Feb 63
STUART	Sydney 16 May 67	30 May 67	Darwin 8 Jun 67
	Singapore 25 Jan 68	3 Feb 68	Singapore 5 Feb 68
SWAN	Singapore 4 Oct 71	6-7 Oct 71	Manila 14 Oct 71
	Singapore 6 Dec 71	8-9 Dec 71	Subic Bay 11 Dec 71
SYDNEY	Sydney 27 May 65	8-11 Jun 65	Fremantle 26 Jun 65
	Sydney 14 Sep 65	28-30 Sep 65	Sydney 20 Oct 65
	Sydney 24 Apr 66	4-6 May 66	Sydney 18 May 66
	Sydney 25 May 66	6-8 Jun 66	Hong Kong 11 Jun 66
	Sydney 8 Apr 67	20-21 Apr 67	Singapore 22 Apr 67
	Singapore 28 Apr 67	30 Apr 67	Sydney 12 May 67
	Sydney 19 May 67	30 May 67	Brisbane 14 Jun 67
	Fremantle 20 Dec 67	27 Dec 67	Fremantle 3 Jan 68
	Sydney 17 Jan 68	3 Feb 68	Sydney 16 Feb 68
	Sydney 27 Mar 68	9 Apr 68	Sydney 26 Apr 68
	Sydney 21 May 68	1 Jun 68	Brisbane 13 Jun 68
	Fremantle 13 Nov 68	20 Nov 68	Fremantle 28 Nov 68
	Fremantle 8 Feb 69	15 Feb 69	Townsville 25 Feb 69
	Townsville 8 May 69	19 May 69	Brisbane 30 May 69
	Brisbane 17 Nov 69	28 Nov 69	Fremantle 5 Dec 69
	Sydney 16 Feb 70	27 Feb 70	Fremantle 5 Mar 70
	Fremantle 21 Oct 70	31 Oct-1 Nov 70	Brisbane 12 Nov 70
	Port Adelaide 15 Feb 71	25 Feb 71	Fremantle 4 Mar 71

Deemed allotment in Vietnamese waters

SHIP	LAST PORT OF CALL / DUTY	IN PORT VIETNAM	FIRST PORT OF CALL / DUTY
SYDNEY (cont)	Port Adelaide 26 Mar 71	5 Apr 71	Hong Kong 8 Apr 71
	Townsville 13 May 71	22-23 May 71	Townsville 1 Jun 71
	Sydney 20 Sep 71	6-7 Oct 71	Port Adelaide 16 Oct 71
	Sydney 26 Oct 71	6-7 Nov 71	Sydney 18 Nov 71
	Sydney 24 Nov 71	8-9 Dec 71	Townsville 17 Dec 71
	Sydney 14 Feb 72	28-29 Feb 72	Townsville 9 Mar 72
	Sydney 1 Nov 72	23-24 Nov 72	Hong Kong 30 Nov 72
TORRENS	Manila 16 Feb 72	28-29 Feb 72	Hong Kong 3 Mar 72
VAMPIRE [2]	Subic Bay 31 May 65	7-8 Jun 65	Sydney 22 Jun 65
	Manus Is 27 Apr 66	4-6 May 66	Hong Kong 9 May 66
	Manus Is 13 Apr 67	20 Apr 67	Singapore 22 Apr 67
	Singapore 28 Apr 67	30 Apr 67	Singapore 5 May 67
	Singapore 14 May 69	19 May 69	Manila 25 May 69
	Pulau Air 21 Nov 72	23-24 Nov 72	Pulau Tioman 26 Nov 72
VENDETTA [3]	Manus Is 20 Sep 65	28-30 Sep 65	Hong Kong 3 Oct 65
	Sydney 25 May 66	6-8 Jun 66	Hong Kong 11 Jun 66
	Manila 28 Oct 70	31 Oct-1 Nov 70	Colombo 9 Nov 70
YARRA [2]	Singapore 25 Apr 66	4-6 May 66	Hong Kong 9 May 66
	Manila 26 May 66	6 Jun 66	Penang 9 Jun 66
	Singapore 22 Dec 67	27 Dec 67	Singapore 1 Jan 68
	Singapore 22 Feb 70	27 Feb 70	Singapore 1 Mar 70
	Singapore 22 Feb 71	25 Feb 71	Hong Kong 1 Mar 71

Notes

1. *HMAS Melbourne* escorted *HMAS Sydney* to within Vietnamese waters but not into port, then detached for other duties.
2. *HMAS Vampire* and *HMAS Yarra* were additional escorts which entered Vietnamese waters but not into port.
3. *HMAS Vendetta* was also allotted for service in Vietnam from 15 September 1969 to 11 April 1970.
4. *VE Act*, s 5(12)(b) has been replaced by s 5B(2)(c).