VeRBosity Volume 19 No. 3

Contents
July - September 2003

Editor's notes

There is a sense of *deja vu* as I write this column. I was previously the Editor of *VeRBosity* from 1985-1989. Other editors have been Judy Buss (1985), Anthony Staunton (1989-1992), Brenda Hennessy (1992), and for the last 11 years, Bob Kennedy. I take the opportunity of my temporary editorship to congratulate and thank Bob for his fine efforts in presenting the reports of AAT and Court cases in a clear and concise manner. His work as Editor and as Director (Legal & Information Services) has been invaluable both to the veteran community and the VRB.

This edition of *VeRBosity* contains reports on veterans' matters in a High Court special leave application, six Federal Court judgments, a Federal Magistrates Court judgment and a 'view' of the United Nations Human Rights Committee, all handed down in the period from July to September 2003. Also reported are selected AAT decisions handed down in the same period.

Information is also included about Statements of Principles issued recently by the Repatriation Medical Authority and matters currently under investigation.

A new section of Questions & Answers has been included to assist practitioners.

Bruce Topperwien
Editor

General Information

NAVY VETERAN APPOINTED NEW REPATRIATION COMMISSIONER

Media Release, Thursday 7 August 2003

A former career officer in the Royal Australian Navy, Rear Admiral Simon Harrington (Ret'd), will be the new Services member of the Repatriation Commission, the Minister for Veterans' Affairs, Danna Vale, announced today.

Mrs Vale said RADM Harrington would take up his three-year appointment as Repatriation Commissioner from 25 August 2003, succeeding Major General Paul Stevens.

"The Repatriation Commission is the agency charged with meeting Australia's commitment to care for those who have served our nation in wars, conflicts and peace operations," Mrs Vale said.

"With the support of the Department of Veterans' Affairs, the Commission delivers compensation and health benefits and discharges the nation's obligation to remember and honour our servicemen and women.

"The Services member of the Commission is appointed from nominations received from the ex-service community. RADM Harrington's appointment was proposed by the RSL, Legacy and the Naval Association of Australia, and I am confident he will be well-received by the Australian veteran community," the Minister said.

RADM Harrington joined the RAN at the age of 15 and, after graduating from the Royal Australian Naval College, served in a number of ships including HMAS Vampire and HMAS Yarra during the Vietnam War.

His 39-year Navy career includes service in the Far East Strategic Reserve and in Papua New Guinea, before commanding HMAS Canberra in 1987-88 and HMAS Adelaide in 1992-93. RADM Harrington also served in positions including Commanding Officer of the RAN College at Jervis Bay, Director General Recruiting and Support Commander – Navy, and was Head of Australian Defence Staff and Defence Attache at the Australian Embassy in Washington for three years until retiring in 2002.

"RADM Harrington brings to his appointment a depth of operational and administrative experience that will be invaluable during what is likely to be a challenging period for the Repatriation Commission," the Minister said.

"This includes the implementation of the proposed new Military Rehabilitation and Compensation Scheme, which is planned to be administered by a commission including the three members of the Repatriation Commission."

In welcoming RADM Harrington to the Commission, Mrs Vale paid tribute to the work of MAJGEN Stevens, who steps down after six years as Repatriation Commissioner.

"Paul Stevens served with distinction on the Commission at a time when the Gold Card was extended, when veteran partnering with private hospitals and Veterans' Home Care were introduced and when the new military rehabilitation and compensation legislation was drafted. He has also been instrumental in guiding significant studies into the health of Vietnam, Korean War and Gulf War veterans.

"MAJGEN Stevens is highly regarded for his dedication to the welfare of veterans and war widows and he leaves the Repatriation Commission with the gratitude and best wishes of the Government and the veteran community," Mrs Vale said.

FAREWELL TO RSL PRESIDENT PETER PHILLIPS

Media Release Tuesday 2 September

The Minister for Veterans' Affairs, Danna Vale, today paid tribute to Major General Peter Phillips as he stepped down as National President of the Returned & Services League of Australia. Attending the national RSL congress in Adelaide, Mrs Vale said MAJGEN Phillips would take with him the best wishes of the veteran community.

"Peter Phillips has been a tireless and dedicated servant of the RSL and the wider veteran community during his six years as National President," Mrs Vale said.

"He has worked closely with the Australian Government, other ex-service leaders and a range of community organisations to advance the interests of our veterans and war widows. In particular, MAJGEN Phillips has been a strong proponent of a strategic approach to aged care for veterans through the National Ex-Service Round Table on Aged Care, and he can take personal pride in the special needs status now accorded to veterans and war widows in aged care planning."

Mrs Vale said the RSL continued to be a mainstay of Australian repatriation after more than 85 years of serving the veteran community.

"The Government has sought to foster a strong and open working relationship with the RSL and other ex-service organisations, to identify and address the priorities of the veteran community.

"Through a cooperative approach we have delivered such advances as the extension of the Gold Card, the indexation of the service and war widow's pensions against Male Total Average Weekly Earnings, the introduction of the Veterans' Home Care program and significant research through a number of health studies.

"The Government is continuing that approach, consulting the RSL and the wider veteran community on an appropriate response to the Clarke Review of Veterans' Entitlements and the implementation of the new Military Rehabilitation and Compensation Scheme.

"I have enjoyed working in partnership with Peter Phillips and I look forward to a close and effective working relationship with his successor, to the benefit of the Australian veteran community," the Minister said.

MINISTER WELCOMES NEW RSL PRESIDENT

Media Release Thursday 4 September

The Minister for Veterans' Affairs, Danna Vale, today congratulated Major General Bill Crews on his appointment as the new National President of the Returned & Services League of Australia. MAJGEN Crews, a Vietnam veteran, succeeds Major General Peter Phillips, who stepped down at this week's national congress after six years at the head of the RSL.

"Veterans' Affairs is characterised by a strong partnership between the Government and ex-service organisations, as part of our mutual commitment to caring for those who serve in the defence of Australia," Mrs Vale said.

"I am confident that under MAJGEN Crews' leadership we will continue to work together in identifying and addressing the issues of most concern to the veteran community."

MAJGEN Crews served in the Royal Australian Engineers Corps, including service in Vietnam and an appointment as Commanding Officer of the School of Military Engineering. He also held senior positions in the Australian Defence Force including Army Chief of Materiel, Assistant Chief of the Defence Force for Policy and Strategic Guidance and Director of the Defence Intelligence Organisation.

MAJGEN Crews was made an Officer of the Order of Australia in 1999 and recently retired as Deputy Chief Executive Officer of the Institution of Engineers Australia.

"I have enjoyed a close working relationship with Peter Phillips in my time as Minister and I look forward to continuing that partnership with Bill Crews," Mrs Vale said.

[Ed: Media releases are reprinted for general public information. Any opinions or commentary in the above material are not necessarily those of the Veterans' Review Board.]

Questions & Answers

The following questions were recently received by the VRB. If you have any questions concerning the *Veterans' Entitlements Act 1986* (VEA) you would like answered you can telephone Peter Godwin on **1300 135 574** from anywhere in Australia at the cost of a local call.

Combination of war-caused and defence-caused disabilities and special rate eligibility

Question: A veteran has both war-caused and defence-caused injuries and diseases. It is mainly his defence caused disabilities that are affecting his capacity to work, but his war-caused ones also play a part in it. Will the fact that they are not all war-caused be a problem with his claim for special rate of pension?

Answer: No. The VEA provides that if a person has both war-caused disabilities and defence-caused disabilities, only one pension is payable for the combination of those disabilities. For the purposes of working out the relevant rate of pension, they are to be treated as if they are all of the one type (that is, either war-caused or defence-caused).

Subsection 19(7) and section 71 of the Act concern veterans who have disabilities accepted both under Part II (concerning war-caused matters) and Part IV (concerning defence-caused matters). Their effect is to deem a person to be receiving a pension either under Part II or Part IV depending on whichever Part of the Act pension was first granted. So, if the first claim made was in relation to operational service and a disability pension was granted under Part II, then if a subsequent claim is made in respect of defence service, and that claim is accepted under Part IV, pension will continue to be paid under Part II of the Act but in respect of both disabilities as if they were both war-caused conditions.

Similarly, if the first claim had have been made in respect of defence service under Part IV and a subsequent claim made in respect of operational service under Part II, the Act operates to provide that the pension is always to be paid under Part IV of the Act. This does not mean that the war-caused disability is not really war-caused or that a different standard of proof applies to its acceptance, this deeming provision only affects the manner in which pension is assessed to ensure that the effects of all of the disabilities, whether war-caused or defence-caused, can be combined and that only one pension is ever paid. Except in relation to compensation offsetting before 1994, there is no practical difference between a pension paid under Part IV and a pension paid under Part II.

When you read section 24, which concerns the criteria for the special rate of pension, you will see that it does not talk about "defence-caused" disabilities at all, only "war-caused" disabilities. The effect of section 71 is to require you to read into section 24 "defence-caused" wherever you see "war-caused". In that way, and through the operation of the deeming provisions considered above,

section 24 then applies to war-caused disabilities, defence-caused disabilities, or a combination of both.

Dates of operational service for item 7

Question: Item 7 of Schedule 2 of the VEA has an end date of 30 September 1967 for the Malaysia, Singapore and Brunei operational area, yet CLIK and the VRB's eligibility web page at http://www.vrb.gov.au/links.html have an end date of 14 September 1966. Which is correct?

Answer: Both. The Act has an end date for that operational area of 30 September 1967 but the latest date that any of the instruments of allotment have set is 14 September 1966. While units of the ADF were in those areas after 14 September 1966, the ADF does not consider that any personnel were involved in activity that would warrant allotment for the purposes of the VEA after that date.

This operational area was included in the legislation to cover the period of confrontation with Indonesia. The Official History of that period, *Emergency and Confrontation* by Peter Dennis and Jeffrey Grey, indicates that the last operations were in August 1966 and the last Indonesian land incursion into the area was in 1965.

It is always important to check the instrument of allotment and look up the veteran's unit to see what the dates of eligibility are for that unit. They do not always coincide with the dates that the unit was in the operational area

Service on Horn Island in WW2

Question: The veteran served on Horn Island in the Torres Strait in 1943. DVA has conceded (because of his actions in relation to attacks by enemy aircraft) that he should be treated as having been in actual combat against the enemy on one of the days during that time for the purposes of rendering operational service. Does he get the extension of operational service to the rest of his eligible war service?

Answer: No. The extension of operational service to the rest of a person's eligible war service given by paragraph (c) of item 1 of the Table under subsection 6A(1) of the VEA only applies to operational service under paras (a) or (b) of item 1. Para (a) concerns service outside Australia, and para (b) concerns service in the north of Northern Territory for 3 months between 19 February 1942 and 12 November 1943.

The extension given by paragraph (c) does not apply to operational service under paragraph (d) of item 1, which concerns being treated as having been in actual combat against the enemy.

Horn Island is part of Queensland and is not "outside Australia" for the purposes of item 1 para (a) in the Table under subsection 6A(1) of the VEA. Any voyage or flight that would have taken the veteran to Horn Island from somewhere else in Australia would most likely not count as rendering full-time service outside Australia for the purposes of that paragraph: see *Repatriation Commission v Kohn* (1989) 5 *VeRBosity* 108.

It was a recommendation of the Clarke Review of Veterans' Entitlements that there be such an extension of operational service for persons who have operational service by reason of having been deemed to have been in actual combat against the enemy, but legislation has not yet been enacted to provide for that change.

A quick search of the AustLII AAT database indicates that there are some 22 AAT cases that have mentioned Horn Island, many of them provide interesting information about service and action in and around Horn Island during World War 2. For example, see the cases of *Griffin* (1986), *Tiplady* (1987), *Pamment* (1993), *Edgar* (1995), *Mullen* (2000), and *Twible* (2003).

Administrative Appeals Tribunal

Re L M Mason and Repatriation Commission

Bullock & Lynch

[2003] AATA 931
22 September 2003

Entitlement – war widow's pension – prostate cancer – high fat diet

Mrs Moran applied for review of the decision that the death of her late husband was not war-caused. He had rendered operation service with the RAAF during World War 2. He died in 1997 of malignant neoplasm of the prostate and hypertension, however hypertension was not pursued as being service related.

The hypothesis was put forward that Mr Mason consumed a diet on service which was high in animal fat. It was contended this diet was a lot higher in animal fat than he consumed pre-service and that the higher intake continued post service for more than 20 years before the clinical onset of his prostate cancer. It was also stated that he consumed the fatty foods post-service as 'comfort food' for his nerves which were a result of his war-caused anxiety disorder. Mrs Mason gave evidence about her late husband's pre-service diet. Although she did not meet him until he returned from service, she lived with his family and could attest to their eating habits.

The hypothesis was supported by Ms Heyman, a dietician, who analysed the pre-service diet animal fat intake as 72.4 grams and post service as 101.9 grams. This was not taking into account the significant consumption of condensed milk that became a big part of his post service diet. A report by Dr English was also relied on concerning Mr Mason's diet during service. Based on the figures in this report for animal fat consumed during periods of service, Ms Heyman calculated the average level consumed during service was 106.4 grams a 47% increase from pre-service.

Dr English did however raise concerns that the figure pre-service was unrealistically low and the evidence of Mrs Moran of her late husband's pre-service diet was second hand. Dr English also disputed the use of American food tables by Ms Heyman to analyse Australian diets and the difference in nutrient value between the cultures. Dr English also reported that there were many influences on our food habits and that made it very difficult to identify one particular factor as having an influence on our eating habits.

Tribunal's conclusions

The tribunal referred to the relevant SOP for malignant neoplasm of the prostate which has as factor that must be related to service in order to raise a reasonable hypothesis:

> (c) increasing animal fat consumption by at least 40% and to at least 70gm/day for at least 20 years before the clinical onset of malignant neoplasm of the prostate

The Tribunal found that the evidence supplied by Mrs Mason to be credible and showed that Mr Mason's high animal fat diet was fairly consistent when he returned from service and throughout his life. There was a dispute between the experts about the use of American and

Australian food tables, but the difference in calculation was seen to be minimal and the Tribunal agreed the figure Ms Heyman reached when using either table found a 40% increase in animal fat intake.

The Tribunal also found there was undisputed evidence that there was a relationship between service and an increase in animal fat which was maintained post service and this was not discounted by the fact that there may also be other factors which would have impacted on Mr Mason's diet post service. There was also undisputed evidence that more fatty foods were consumed as "comfort food" for his nerves and his accepted anxiety disorder.

The Tribunal found that the there were sufficient grounds for finding Mr Mason's death to be war-caused.

Formal decision

The Tribunal set aside the decision under review and substituted its decision that the death of Mr Mason was war-caused.

Re G S Fish and Repatriation Commission

Ettinger & Thorpe

[2003] AATA 675
17 July 2003

Entitlement – whether travelling to commence duty

Mr Fish applied for review of a decision that rejected his claim for intracerebral haemorrhage as being war-caused. He served in the Navy and had defence service from 1972 to 1982.

Mr Fish contended that his condition was caused by a motor vehicle accident that occurred as he travelled back to base after a long weekend visiting his family. He stated he had to leave his address so he could be contacted if needed and was also issued with a travel warrant, food and travel allowances. He alleged he was on a work related journey as he travelled back early to base on Sunday 4th February 1973 in order to prepare his kit, do his washing and ironing and be ready to start a course on the Monday.

Mr Fish claimed that since this accident in 1973 he had suffered headaches. He also admitted he suffered numerous football injuries but said the headaches from these were different from the ones that resulted from the motor vehicle accident. He also gave evidence of his alcohol consumption and the increase after the accident in order to try and relieve the headaches. It was claimed that he drank so heavily after service it contributed to his stroke.

The Commission submitted that Mr Fish was not travelling as part of his service when he had the accident. They accepted that Mr Fish was unconscious for sometime after the accident, but a medical report that was written after an assessment of the applicant some weeks after the accident showed no mention of continuing headaches. They also relied on evidence by Dr Murray who stated that in the absence of abnormalities, the cerebral haemorrhage was caused by hypertension, although his blood pressure was never particularly high. As to alcohol consumption it was contended Mr Fish drank socially before the accident both whilst on board the ship and on leave.

Relevant case-law on travelling

First, the Tribunal had to consider if the motor vehicle accident could be determined as being defence-caused. The tribunal noted that the applicant was returning to his quarters and not to duty, and there was a considerable time lapse before he was required on duty. The Tribunal noted that situations similar to this had been addressed in case-law previously and referred to the following cases:

Jamieson v Repatriation Commission (1984) – a member who resided at a place where he was employed was not travelling to his place of employment within the meaning of the relevant legislation, if he left for private purposes, was not returning from a period of temporary residence elsewhere, and his immediate purpose for returning was that the place to which he was travelling was the place at which he resided.

The Commonwealth v Wright (1956) – "travelling" as a word describing going to or from a man's employment, is hardly the word for an excursion between his employment and some place of limited activity.

Truchlik v Repatriation Commission (1989) – rendering service involves more than merely being enlisted.

Re Repatriation Commission and Hopper (1988) – The decision, in part, was affirmed for a veteran who suffered injuries in a motorcycle accident during the course of returning to the barracks where he resided, some hours before he was next required for duty.

Holthouse v Repatriation Commission (1982) – Whether or not an injury or disease resulting from activities within the sphere of a member's personal life could be attributed to service – the Court held an injury that occurred whilst performing domestic activities was not defence-caused.

Roncevich v Repatriation Commission (2003) – Where a member was engaged in activities on base in which he was not required to partake, it was held not to be connected to the rendering of service.

Repatriation Commission v Tuite (1993) – If the circumstances of eligible war service provide an operative cause contributing to the serviceman's injury or disease, it matters not that the relevant circumstances, such as peer pressure to smoke, could be found elsewhere than in camp life.

Having reviewed the case-law, the Tribunal found that Mr Fish had left the base for private business, was returning to his place of residence on base, and that there was a considerable gap in time before he was to commence duties. It also found he was not travelling with the purpose of performing duty. They therefore found he was not on service related business when he incurred his injuries.

Cause of headaches

Concerning the matter of whether the headaches were the result of the accident the Tribunal referred to SoP No 53 of 1999 which states in factor 5(m):

> "for intracerebral haemorrhage only,
>
> (i) undergoing anticoagulant therapy at the time of the clinical onset of cerebro-vascular accident; or
>
> (ii) taking aspirin:
>
> (A) on at least three days per week; and
>
> (B) for a continuous period of at least four weeks; and
>
> where the last dose of aspirin taken before the cerebrovascular accident was taken within the seven days immediately before the clinical onset of cerebrovascular accident"

The Tribunal found that they were not satisfied that the headaches for which the aspirin was taken arose from the motor vehicle accident and there was no medical evidence to support the accident as being the cause of the headaches.

As to the applicant's alcohol consumption the Tribunal was satisfied that Mr Fish increased his consumption after service but any headaches suffered were not the result of the accident but the result of his sporting injuries, his drinking and other

causes. Therefore his claim for intracerebral haemorrhage had to fail.

Formal decision

The Tribunal affirmed the decision under review.

Re P Butler and Repatriation Commission

J Handley

[2003] AATA 789
12 August 2003

Assessment – special rate of pension – left last job because of non war-caused work injury – moved to remote country location – work injury resolved in 1989 – subsequent war-caused PTSD – unable to obtain work

This case demonstrates that the 'traditional' factors that tend to prevent a person from obtaining the special rate of pension do not always do so and that every case needs to be judged carefully on its merits. In this case, the veteran had received workers compensation for a non war-caused disability that had caused him to leave his last job, had moved to a remote location, was in receipt of service pension, and had not worked for 20 years. These are often factors that preclude eligibility for the special rate.

Mr Butler had worked variously as an abattoir worker, a builders labourer, a fork-lift driver/machine operator, or driver. In 1982 or 1983 he injured his back at work and received workers compensation payments. After being unable to undertake light duties because of the back pain, his employment was terminated. He moved to a remote country area in northern Victoria because the climate better suited his prickly heat rash that he had suffered from since Vietnam.

By about 1989 or 1990, the back problem had resolved as was evidenced by the fact that he was able to cut firewood without restriction and was otherwise pain-free. At about that time he sought employment in his local area, but without success.

In about 1994 he suffered acute symptoms of post traumatic stress disorder (PTSD) and thereafter was treated by a psychologist and later a psychiatrist. It was accepted as a war-caused disease in 1995.

In 2000 or 2001 he sought work with local trucking companies and a supermarket, but was rejected because of his PTSD. Evidence was given at the hearing by one of the employers to whom he had applied for work that the previous back injury was not a concern to the employer, but that the PTSD was the reason for not giving Mr Butler a job. The employer said that he had advertised about 10 jobs annually. Thus even though the area was somewhat remote, it was not the case that there was no work available that the applicant might otherwise have been able to do. The Tribunal said:

> "The absence of the back injury at 1990 would have otherwise permitted him to return to the workforce in industries [of the type in which he had previously worked]. Indeed there is nothing to have prevented the applicant from returning to any unskilled manual labour being a characteristic ... of his former history."

The Tribunal found that the efforts that Mr Butler had made in 2000-2002 to obtain work indicated that he did not regard himself as someone who had retired. The Tribunal said:

> "Receipt of invalid [service] pension occurs because a person satisfies

> statutory criteria of qualification. It is not evidence of or payable because of retirement. Qualification for a pension does not prohibit employment should suitable work become available"

The Tribunal found that it was the PTSD, alone, that prevented Mr Butler from continuing to undertake the unskilled manual labouring work that he had previously undertaken; and that as a consequence he was suffering a loss of salary or wages.

The Tribunal found that lack of recent work experience and increasing age were not relevant given the employer's evidence that but for the PTSD he would have given Mr Butler a job. Subpara 24(2)(a) was not considered relevant because it was only his PTSD that had taken Mr Butler out of the workforce.

The Commission had conceded that PTSD prevented Mr Butler from working more than 8 hours a week, and that his degree of incapacity was at least 70%.

Formal decision

The Tribunal set aside the decision under review and assessed pension at the special rate.

Re N M Stevens and Repatriation Commission

Carstairs

[2003] AATA 636
4 July 2003

Eligibility for 'defence service' – whether a 'member of the Forces'– part-time service – whether engaged for period of 3 years continuous full-time service – meaning of 'discharge'

Mr Stevens' claim for pension had been refused on the ground that he was not a 'member of the Forces' as defined in the VEA. His Certificate of Service indicated that he had served as follows:

part-time	18 Sep 1950 - 17 Apr 1958
part-time	13 Sep 1961 - 11 May 1976
part-time	15 Mar 1977 - 28 Feb 1982
full-time	1 Mar 1982 - 6 Apr 1982
part-time	7 Apr 1982 - 17 May 1988

At all relevant times he was a member of the Citizen Military Forces or Army Reserve.

The essence of Mr Stevens' case was that he should get the benefit of the 'medical discharge' exception to the 3-year requirement for eligibility for 'defence service' under s69(1)(d) of the VEA because he was forced to go from full-time service to part-time service for medical reasons. The relevant provisions of the VEA provide:

> "69(1) Subject to this section, where a person:
>
> (a) has served in the Defence Force for a continuous period that commenced on or after 7 December 1972 and before the terminating date; ...
>
> this Part applies to the person:
>
> (c) if the person:
>
> (i) has served on ***continuous full-time service*** as a member of the Defence Force after 6 December 1972; and
>
> (ii) has, whether before or after that date, completed 3 years' effective full-time service as such a member; or
>
> (d) if:
>
> (i) the person has served as a member of the Defence Force under an ***engagement to serve for a period of continuous full-time service of not less than 3 years***; and

(ii) the person's service as such a member was terminated before the person had completed 3 years' effective full-time service as a member of the Defence Force, but after 6 December 1972, by reason of the person's death or the person's ***discharge on the ground of invalidity or physical or mental incapacity to perform duties***; ..."

(emphasis added)

Mr Stevens commenced full-time duty under s 50(3) of the *Defence Act 1903* on 1 March 1982 with a view to serving until he turned 60 in 1988 as he had been told that an extension past the normal retirement age of 55 years could be arranged. An application for such an extension was made on 13 July 1982, and the extension was granted in November 1982. However, Mr Stevens found that he was unable to cope with the extra duties because of his disabilities and he ceased full-time duty on 7 April 1982. He was not discharged, but instead opted to return to part-time duty.

The Tribunal found that Mr Stevens could not satisfy the legislative criteria for a number of reasons.

First, at the time he commenced full-time duty he was not 'under an engagement to serve for a period of continuous full-time service of not less than 3 years'. At that time, he had not obtained an extension to serve past the age of 55 and so any engagement under which he served at that time would have had to have been less than 3 years. This is notwithstanding that when the extension was granted in November 1982, it was backdated to 15 March 1982, a time at which he had been on full-time duty.

Secondly, at the time he ceased full-time duty Mr Stevens was not 'discharged'. The Tribunal said:

"[23] ... Although this term is not defined in the Act, it should be given its ordinary meaning in the context of military service. The *Macquarie Dictionary* defines discharge as *to relieve or deprive of office...dismiss from service*. Assistance can be gained from the terms defined in, and the requirements of, the legislation relating to military service. Section 31 of the Defence Act sets out that the Army consists of two parts: *the Permanent Military Forces and the Army Reserve*. Section 32(b) of the Defence Act provides that the former includes officers and soldiers transferred to the Regular Army from the Army Reserve.

[24] The Defence Act provides for the making of regulations dealing with matters such as enlistment, promotion and discharge. In regard to the army, these are the Australian Military Regulations 1927 (the Regulations). In 1982, Reg.176 (since repealed) provided the grounds for discharge under the Defence Act, including that the soldier was medically unfit: Reg.176(1)(h). Regulation 177 provided that the discharge of a soldier for any of the reasons prescribed in Reg. 176(1) required an order for discharge signed by the Chief of the General Staff. It was not part of the applicant's case that he was discharged at the end of the period of full-time duty. His evidence was essentially that he had returned to part-time duty by agreement and wished to avoid being discharged. Although the return may have been for reasons of health, s69(1)(d) of the Act provides only for *discharge* on the grounds of incapacity.

Formal decision

The Tribunal affirmed the decision under review.

High Court of Australia

Hendy v Repatriation Commission

Gleeson CJ, Gummow J

[2003] HCATrans 358
12 September 2003

Special rate – meaning of "of itself alone" in s24(1)(b) and "alone" in s24(1)(c)

The applicant in this application for special leave to appeal to the High Court argued that the word "alone" as used in s24(1)(c) of the VEA should be given the same meaning as the phrase "of itself alone" in s24(1)(b).

The two paragraphs are as follows:

> "(b) the veteran is totally and permanently incapacitated, that is to say, the veteran's incapacity from war-caused injury or war-caused disease, or both, is of such a nature as, ***of itself alone***, to render the veteran incapable of undertaking remunerative work for periods aggregating more than 8 hours per week; and
>
> (c) 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;"

Dr Flick QC, appearing on behalf of Mr Hendy noted that:

> "What the Tribunal does is to look through the medical evidence under ... s24(1)(b) and asks itself the question: looking at the accepted war-caused injuries, do those injuries of themselves alone, free of any other consideration, render the veteran incapable of undertaking remunerative work?"

He argued that the same "free from any other consideration" test applied to the interpretation of the "alone" test in s24(1)(c). Gleeson CJ went straight to the heart of the issue and asked Dr Flick:

> "GLEESON CJ: Or does it mean: is the war-caused injury all that is preventing the veteran from continuing to undertake work? Are they the competing points of view?"
>
> DR FLICK: Yes. When it gets to paragraph (c), what the Tribunal does is to say, 'These are the war-caused injuries, but are they the only factors which prevent the veteran from satisfying subparagraph (c)?' The way in which the Full Court has consistently approached the matter is to follow the decision of the Full Court of the Federal Court in a case called *Flentjar* ... . [W]hat the Tribunal does, consistently with this decision of the Full Court, is that it asks itself:
>
> 1. What was the relevant 'remunerative work that the veteran was undertaking' ...
>
> 2. Is the veteran, by reason of war-caused injury ... or both, prevented from continuing to undertake that work?
>
> Then the error, as we see it, emerges in questions 3 and 4:
>
> 3. If the answer to question 2 is yes, is the war-caused injury or war-caused disease, or both, the only

factor or factors preventing the veteran from continuing to undertake that work?

4. If the answers to questions 2 and 3 are, in each case, yes, is the veteran by reason of being prevented from continuing to undertake that work, suffering a loss ..."

...

DR FLICK: ... [I]f one goes back through the Full Court decisions ... one finds this repetition of the statutory requirements in terms of "Is this the only matter which prevents the veteran from working?" repeatedly set forth with no suggestion that it is wrong. What is put against us, of course, is its statutory construction. It has been addressed by the Full Court and repeatedly resolved in the way in which it is set out here.

GLEESON CJ: I suppose part of the reasoning of the Full Court, if you ... look at the text of the statute, is that it does not ask whether the veteran ***would***, by reason of incapacity from war-caused injury alone, be prevented; it asks whether the veteran ***is***, by reason of that incapacity alone, prevented. Your construction seems to address a hypothetical situation.

DR FLICK: Yes, and all Full Court decisions say that what the section invites is a hypothetical question.

GLEESON CJ: But the Full Court does not accept that it invites the question whether the veteran ***would***, by reason of that incapacity alone if there were no other supervening circumstance, be prevented.

DR FLICK: We accept that. The argument would be easier if the word 'would' was there rather than 'is'. The construction which we are urging, we would contend, is supported by the object and purpose of the Act, namely, does the Veterans' Entitlements Act really invite a more wide-ranging inquiry as to social conditions, or is it confined simply to an inquiry as to the war-caused injuries and what a veteran has suffered?

The example that we have given and the Chief Justice exposes by different permutations of it, we say, only works our way because it is directing attention to how severely incapacitated or injured was a veteran.

If he is suffering an injury or an incapacity to the extent that by reason of those injuries alone he cannot do something, that is all that a veteran has to satisfy to get the rates of pension set out in the legislation. What the Veterans' Entitlements Act is directing attention to is the war injuries, not the social conditions.

Ms Henderson responded on behalf of the Repatriation Commission:

"MS HENDERSON: ... The position is that the special rate ... is payable in circumstances where the incapacity from war-caused injury or war-caused disease alone, meaning as the only causal factor, is producing an economic loss for the veteran. That is the burden of the section and of the similar section in relation to intermediate rate. The function of the word 'alone', in our submission, is quite plain and clear. It means that this must be the sole and only cause of the economic loss which the veteran is sustaining. ..."

Formal decision

The Court refused Mr Hendy's application on the ground that there were insufficient prospects of success of an appeal to warrant a grant of special leave.

Federal Court of Australia

Repatriation Commission v Hancock

Selway J

[2003] FCA 711
16 July 2003

Entitlement – determination of kind of death

The Repatriation Commission appealed against a decision of the Tribunal that Mr Hancock's death was war-caused. On admission to hospital in 1999, he was found to have inoperable cancer. Four days later, he suffered a right-sided stroke. He died some three weeks after the surgery. The certified cause of his death at the age of 82 was small bowel adenocarcinoma. He also suffered from osteoarthrosis of both knees which was accepted as war-caused.

Mr Hancock's general practitioner, Dr Betty gave evidence at the Tribunal that in his view, the osteoarthrosis of both knees from which Mr Hancock had suffered contributed to and expedited his death. Dr Betty said that, by reason of his immobility, he was not able to exercise properly. As a result of this lack of exercise, Mr Hancock's life expectancy was reduced from the 3-6 months that he otherwise would have expected, to a mere three weeks. Dr Betty was not able to identify the mechanism by which Mr Hancock's immobility had shortened his life.

Selway J observed that the evidence given by Dr Betty at the Tribunal was surprising. He said:

> "One would not readily assume that the cause of death of an 82 year old man suffering from inoperable cancer who died within three weeks of major surgery and within two weeks of suffering a stroke was arthritis of the knees. Nevertheless that was the effect of Dr Betty's evidence."

Correct approach

Selway J said that the Tribunal, faced with the evidence of Dr Betty, should have proceeded as follows:

(a) First, the Tribunal was required to determine, on the balance of probabilities, whether the pre-conditions other than causation, had been made out. None of these (ie, that Mr Hancock was a veteran, that the respondent was his widow and that Mr Hancock had died) were in dispute.

(b) Next, the Tribunal was required to determine on the balance of probabilities what "kind of death" Mr Hancock had suffered. This involved the identification, on the balance of probabilities, of any and all SoPs and/or determinations under s 180A(2) of the VEA and any other "kinds of death" which were applicable to that death. (see *Fogarty v Repatriation Commission* [2003] FCAFC 136; *Benjamin v Repatriation Commission* (2001) 70 ALD 622).

(c) If one or more SoPs were applicable, then the methodology in *Deledio* was applicable in relation to those "kinds of death".

(d) If only a determination under s 180A(2) was applicable, then the application must fail.

(e) If no SoP and no determination was applicable at all or to a particular "kind of death", then the methodology set out by the High Court in *Byrnes* was applicable.

In this case, there was no dispute that if the "kind of death" was solely due to cancer of the small colon, then war service was not a cause within the terms of the SoP. On the other hand, if the kind of death was or included arthritis of the knees then war service was a cause. The issue in dispute was not directly about the causative relationship between war service and the various injuries and illnesses that Mr Hancock was suffering from. The issue was whether Mr Hancock's arthritis was related to his death. If it was then the relevant SoP was applicable.

Error of law

Selway J concluded that the Tribunal had failed to follow this approach. The Tribunal had engaged in an analysis under s 120(1) and (3) of the VEA, of the sort identified by the High Court in *Byrnes.* It had failed to determine the "kind of death" on the balance of probabilities. It did not determine, on the balance of probabilities, whether a SoP was applicable. That question necessarily preceded any analysis under s 120(3) of the VEA. The failure of the Tribunal to determine the "kind of death" on the balance of probabilities was an error of law.

Formal decision

The Court set aside the Tribunal's decision and remitted the matter to the Tribunal for rehearing.

Woodward & Gundry v Repatriation Commission

Black CJ, Weinberg & Selway JJ

[2003] FCAFC 160
30 July 2003

Entitlement – PTSD – experiencing a severe stressor – nature of the occurrence test

Mr Woodward lodged an appeal against decisions of the Tribunal that his post traumatic stress disorder and alcohol dependence or alcohol abuse were not war-caused (see 18 *VeRBosity* 72). He served with the Australian Army in Vietnam in 1969-1970. While his duties in Vietnam were mainly as a clerk, he claimed that he was involved in a number of stressful events during patrols around Nui Dat and as a passenger in helicopters.

Mr Woodward had submitted that in the event that he was unable to satisfy the Statements of Principles, his injuries were war-caused pursuant to s 9(1)(a) of the VEA, without reference to Statements of Principles. He submitted that in terms of the "occurrence" provision in s 9(1)(a), the connection to service need be no more than temporal. He submitted that satisfaction of a Statement of Principles has no relevance to a finding under s 9(1)(a), and the determination of a Statement of Principles does not displace the operation of that section. This submission was based on certain comments by the majority of the Full Court in *Repatriation Commission v Keeley* (2000) 16 *VeRBosity* 40.

The Tribunal rejected this submission, saying that Mr Woodward's entitlement to pension or benefits under the Act could not be determined under s 9(1)(a) without reference to the Statements of Principles. The Tribunal said that the comments by Lee and Cooper JJ in *Keeley* were

clearly *dicta* and did not correctly state the law.

[Ed: An appeal by Mrs Gundry against a decision that the death of her late husband was not war-caused was heard together with this case. Both appeals were referred to the Full Court for hearing because they raised for consideration the correctness or otherwise of the observations of the majority in *Keeley*.]

Submissions on occurrence provision

On appeal to the Full Court, it was submitted that both Mr Gundry's death and Mr Woodward's diseases were war-caused because they had "resulted from an occurrence that happened while the veteran was rendering operational service". It followed that their appeals fell to be considered under ss 8(1)(a) and 9(1)(a) respectively. This meant that s 120A had no application, and that the AAT had erred in having regard to any of the SoPs that might otherwise have been considered relevant.

The applicants also contended that if their primary submission was rejected, the new regime of SoPs introduced in 1994 had no application to cases which did not involve recourse to "medical-scientific" opinion. If a claim could be determined without reference to expert knowledge of that type, the fact that an applicant did not meet the requirements of the template in the SoP relating to the condition which caused his death, or incapacity, was of no relevance.

It was submitted that the AAT had erred by regarding the observations of Lee and Cooper JJ in *Keeley* merely as *dicta.* It was contended that they were in fact *ratio* and that the Full Court should follow *Keeley* unless persuaded that the decision was clearly erroneous.

The Repatriation Commission submitted that the passages relied upon in *Keeley* were clearly *dicta*. However, if those passages were part of the *ratio* of that case, it was submitted that they were clearly erroneous and should not be followed.

The Commission also submitted that, contrary to what was said in *Keeley*, neither ss 8(1)(a) nor 9(1)(a) contemplated that the link between the death of the veteran or a disease contracted by the veteran and war service might be no more than temporal. Where ss 8(1)(a) and 9(1)(a) referred to "an occurrence that happened while the veteran was rendering operational service", it was incorrect to say, as had been said in *Keeley*, that it was not necessary that there be a causal link between the event or events and the operational service. The existence of a temporal link was necessary, but not sufficient. There had to be a causal link as well. So much was clear from the use of the expression "resulted from" in ss 8(1)(a) and 9(1)(a).

Full Court's conclusion

The Full Court held that the AAT was correct in deciding that the passages in the joint judgment of Lee and Cooper JJ in *Keeley* were *dicta*, and not *ratio*. The Full Court said that those passages contained erroneous statements of law and should not be followed.

The Full Court said that sections 8(1)(a) and 9(1)(a) plainly require first, an "occurrence" that happened during operational service. There must be a ***temporal*** relationship between the event (which constitutes the occurrence) and the service in question. However, the claimed "death" in the case of s 8(1)(a), or "injury or disease" in the case of s 9(1)(a), must result from that event or events. The words "result from" are words of causation and require that there be a ***causal*** link between the veteran's service and the "death", or "injury or disease", that "happened during operational service".

The Full Court said that a claim that "death", or "injury or disease", is war-caused (where that claim relates to operational service) is to be determined by applying the standard of proof set out in s 120(1) and (3). Once s 120(3) operates, the process of determining the claim is drawn inexorably into the sphere of s 120A. It follows that if there is a SoP in force that is relevant to the claim, the requirements of the SoP must be met.

[Ed: Mrs Gundry's appeal was dismissed as it was based solely upon the question of law concerning *Keeley's* case.]

Experiencing a severe stressor

In the alternative, Mr Woodward submitted that the Tribunal had adopted too narrow an approach to the interpretation of the words "experienced" and "confronted with" in the definition of "experiencing a severe stressor" in the relevant Statements of Principles.

The Tribunal had concluded that there was nothing in Mr Woodward's Vietnam service that would satisfy the definition of "experiencing a severe stressor". While he was in fear and had a sense of helplessness and horror and resorted to alcohol for comfort, there was no material raised or pointing to him "experiencing, witnessing or being confronted with an event or events involving actual or threatened death or serious injury or threat to him or others".

Mr Woodward submitted that the Tribunal had erred in law in treating the word "experienced" as being limited to "observing" or "encountering" an event of the relevant kind. It was the experience of the veteran that was of paramount concern and not whether the stressors were "objectively" of such a nature as might actually have caused such an experience.

Error of law

The Full Court accepted Mr Woodward's submission that the Tribunal had erred in law in its interpretation of the expression "experiencing a severe stressor". The Full Court said that the definition of "experiencing a severe stressor" has three elements that relate to a person's encounter with an event involving death - the person must have "experienced, witnessed or [have been] confronted with an event that involved death...". The definition will be satisfied if any one of them is present.

The Full Court said that as a matter of ordinary usage, to be "confronted" with something means to be brought face to face with it either physically or, perhaps more commonly, in the mind. If the thing being confronted is an event, usage does not require that the person be present at the event she or he "confronts". This is no less the case when the confronting event is one involving death or serious injury.

In Mr Woodward's case, the material pointed to an event involving the death of two pilots with whom, according to the material, he had flown on operations against the enemy. He was also required to process forms concerning the deaths and to pack the belongings of one of the pilots. Had the Tribunal brought to its task a correct understanding of the definition of "experiencing a severe stressor" it might have concluded that he was relevantly "confronted with an event ... that involved actual death...".

The Full Court also referred with approval to the recent Court decision in *Stoddart v Repatriation Commission* (2003) 19 *VeRBosity* 48, in which Mansfield J held that the Tribunal had erred in requiring that a "threat" be one that, judged objectively and remote from the circumstances and state of knowledge of the person experiencing it, has a real or actual prospect of resulting in death or

serious injury. On this view, the term "experiencing" has a subjective connotation that must be applied.

Similarly, in Mr Woodward's case the Tribunal had erred in law by requiring that the threat of death or serious injury must be real, judged objectively.

Formal decision

The Full Court set aside the Tribunal's decision in Mr Woodward's case and remitted the matter to the Tribunal for rehearing.

Dunlop v Repatriation Commission

Spender, Tamberlin & Kenny JJ

[2003] FCAFC 201
27 August 2003

Claim by widow – whether veteran's death by suicide was war-caused

This was an appeal by Mrs Dunlop from the judgment of Ryan J (see (2002) 18 *VeRBosity* 103).

The veteran had served in the Army in World War 2, including seven months in an anti-aircraft unit in Merauke in Dutch New Guinea in 1944. He was diagnosed with depression in early 1970 and committed suicide in 1972.

Dr Cole, a psychiatrist, gave evidence that the symptoms described to him by the veteran's widow pointed to post-traumatic stress disorder but the information was incomplete and as he was unaware of any stressful event, he assumed that his war service was stressful. He said that as he could not identify a particular stressor, it made diagnosis difficult.

Dr Walton could find no evidence to connect the veteran's depression with his war service. He said that the evidence pointed to symptoms of depression in 1969 and a difficulty for the veteran in adjusting to civilian life, but that this did not point to depression. He said that the veteran's retention of a sense of humour and greater maturity after the war did not indicate depression.

A military historian, Mr Piper, gave evidence that there was no record of the veteran's unit ever engaging with the enemy, and that while the New Guinea natives were referred to as "head hunters", they were friendly and were not a threat to the soldiers.

For Mrs Dunlop it was argued that the AAT had misapplied the evidentiary provisions of the VEA and the steps set out in *Deledio* by failing to properly consider Dr Cole's evidence, the widow's evidence, and the inferences that could be drawn from it. It was argued that at step 1 of *Deledio* the AAT was not permitted to make value judgments on the material and so it was wrong for it to accept the historian's evidence rejecting the widow's assertions that there were "head hunters" that could have been a severe stressor for the purpose of raising a hypothesis.

Application of *Deledio*

The Court rejected this argument and said:

> "[33] There is no doubt that the AAT had regard to the principles in *Deledio*. It applied the first step and the third step and found against the appellant's claim. There is no legal necessity for the AAT to proceed from step to step in any mechanical manner. The AAT reasons do not indicate that any onus was placed on the appellant. The AAT cited *East* where the Full Court pointed out that a reasonable hypothesis requires more than a ***possibility***, something which is not fanciful or unreal, or inconsistent with the known facts and

must be a hypothesis ***pointed to*** by the facts even though not proved upon the balance of probabilities. The AAT appreciated that it would be a 'rare' case where a hypothesis could not be established connecting service with injury, disease or death and went on to say:

> 'However, on the material before us we struggle to comprehend what the hypothesis could be in the present circumstances.'

[34] This statement indicates that the AAT had regard to the material before it and asked itself the correct question, namely, whether the material raised the necessary hypothesis, with a full appreciation that the task of raising an hypothesis did not pose a high threshold. The AAT was conscious that it was necessary to determine whether each essential element in such a hypothesis had been raised or pointed to by the material as indicated by its reference to the quotation from Kenny J in *Connors* at [16]. In [60] of the AAT reasons in this case, it is apparent that the decision was based on the absence of an essential 'link' or 'element' in the hypothesis, namely, the absence of material which pointed to contribution by service. The AAT, in our view, correctly considered that the depression suffered by the veteran must be connected to service by a reasonable hypothesis to that effect and it determined that there was insufficient material which pointed to that connection and concluded therefore that there was no reasonable hypothesis. This was a decision for the AAT, and not for this Court.

[35] In reaching its conclusion the AAT did not, on a fair reading of its reasons, reject or evaluate the comparative weight or acceptability of the material but simply found that on examination of all the material no reasonable hypothesis was raised or pointed to. There is no reference in its reasons to weighing the evidence or comparing the evidence at that point." (the Court's emphasis)

Formal decision

The Full Court dismissed the appeal and ordered the appellant to pay the Commission's costs.

Repatriation Commission v Van Heteren

Finn J

[2003] FCA 888
27 August 2003

Special rate – whether prevented by war-caused disabilities alone

This appeal to the Federal Court by the Repatriation Commission comes about mainly due to what the Court described as "contradictory and confusing" passages in the AAT's reasons for decision, which demonstrated that the AAT had not engaged in the reasoning process required by the Act when considering the tests in s24(1)(c).

The Court endorsed the approach set out in the cases of *Flentjar* and *Forbes*. In particular, the relevant questions being:

> "1. What was the relevant 'remunerative work that the veteran was undertaking' within the meaning of s 24(1)(c) of the Act?
>
> 2. Is the veteran, by reason of war-caused injury or war-caused disease, or both, prevented from continuing to undertake that work?
>
> 3. If the answer to question 2 is yes, is the war-caused injury or war-caused disease, or both, the only

factor or factors preventing the veteran from continuing to undertake that work?

4. If the answers to questions 2 and 3 are, in each case, yes, is the veteran by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that he would not be suffering if he were free of that incapacity?"

Application of *Flentjar* and *Forbes*

The Court then went on to explain how these questions should be approached.

"[18] First, the 'remunerative work' to which the paragraph refers is the remunerative work undertaken by the veteran before he or she was prevented from continuing to undertake that work. The term, though, does not refer simply to a particular job with a particular employer: *Banovich v Repatriation Commission* (1986) 69 ALR 395 at 402; nor merely to the last remunerative work undertaken before the veteran's inability to work became complete: *Starcevich v Repatriation Commission* (1987) 18 FCR 221 at 225. It signifies the type of work which the veteran previously undertook but which because of war-caused incapacity alone he or she can no longer undertake: *Banovich* at 402. The Act requires identification of that type of work as part of the veteran's demonstration that he or she has suffered a real and substantial loss consequent alone upon war-caused incapacity: see *Starcevich's* case, at 225. It is that remunerative work and not remunerative work at large with which s 24(1)(c) is concerned.

...

[20] Secondly, as the Commission conceded, Mr Van Heteren was totally and permanently incapacitated for the purposes of s 24(1)(b). His incapacities from war-caused disabilities alone were such as to render him incapable of undertaking remunerative work for periods aggregating more than eight hours per week. Section 24(1)(c) presupposes he is so incapacitated such that the veteran cannot simply point to it without more to satisfy the two limbs of s 24(1)(c). The reason why this is so is that factors other than war-caused incapacity may be part of the reason preventing the veteran from continuing to engage in the particular type of work in which he or she had previously been engaged: *Forbes'* case at [39]-[40].

...

[24] ... Mr Van Heteren's heart condition alone may have been ***sufficient*** to prevent him from continuing to engage in his previous remunerative work. But it may not necessarily have been the only reason preventing him from so doing: see generally *Hendy's* case; *Forbes'* case; ... The Tribunal did not consider that question even though it was aware of Mr Van Heteren's non war-caused disabilities and of their earlier significance in preventing him from continuing to engage in remunerative work.

[25] Finally, the second limb of s24(1)(c) (ie the fourth *Flentjar* question). If the Tribunal has found that the 'alone' test is satisfied it must then determine if the veteran was suffering a loss of income that he or she would not be suffering if free from war-caused incapacity. This question is not answered simply by finding that, in the assessment period, the veteran is unable to engage in any remunerative work. It in fact presupposes that he or she may well not be: cf s 24(1)(b). And

> because of the deemed 'no loss' provisions of s 24(2)(a)(i) which apply where the veteran has ceased to engage in remunerative work for reasons other than his or her war-caused conditions, it requires an examination of the reasons why the veteran ceased work."

Formal decision

The Court allowed the Commission's appeal, set aside the decision of the AAT and remitted the matter to be reheard.

Leane v Repatriation Commission

Finn J

[2003] FCA 889
27 August 2003

Special rate – "alone" test – whether "genuinely seeking" remunerative work

In dealing with the "alone" test in s24(1)(c), rival contentions had been put to the AAT. One was that Mr Leane's PTSD had put him out of work, and the other was that there were medical factors beyond his PTSD preventing Mr Leane from continuing to undertake the kind of work he had been undertaking.

The AAT found that the evidence on whether PTSD was the only factor preventing Mr Leane from continuing his work was "not clear cut" and that a number of medical practitioners had suggested non-PTSD problems had resolved while others had disputed it. It said that on the material, it was "not able to make a finding on the balance of probabilities in Mr Leane's favour."

While the Court found that the AAT's reasons were "brief, oblique, marred by one clear error, and ungraced with convincing explanation", it was satisfied that in the end it did properly address the question s24(1)(c) asked. The Court quoted from *Hendy's* case, which noted that error on the part of the Tribunal in determining whether the veteran's war-caused injury or war-caused disease is the sole determinant in the prevention of continued remunerative work is not open to review in the Court.

"Other causes" must be considered

The Court rejected an argument that the proper test to be applied in construing the word "alone" in s24(1)(c) was whether the war-caused conditions alone were sufficient to prevent Mr Leane from engaging in work *irrespective* of other causes. The Court held that test could not be met if there were other such causes also operating.

The "genuinely seeking" test

The Court also rejected an argument that the Tribunal had wrongly failed to apply s24(2)(b). The Court said:

> "[28] ... one of the preconditions to be satisfied before that provision can be invoked is that the veteran 'satisfies the Commission that he or she has been genuinely seeking to engage in remunerative work'. The word 'seeking' in my view is used here in its dictionary senses of 'attempting to' or 'trying to': see *Shorter Oxford English Dictionary*, 'seek' (3rd ed). The Tribunal was not satisfied that there were any 'objective signs of active pursuit of remunerative work' on the evidence before it. That conclusion is not reviewable in this court there being no error of law that infected it."

Formal decision

The Court dismissed the appeal and ordered the applicant to pay the Commission's costs.

Repatriation Commission v Parr

Moore J

[2003] FCA 970
15 September 2003

Entitlement – "clinical onset" – appropriate court order on remittal

In this appeal by the Repatriation Commission, both parties agreed that the AAT had made an error of law when it decided when the clinical onset of the veteran's claimed disabilities occurred.

"Clinical onset"

The Court noted that the AAT had not complied with the requirements set out in *Lees'* case that "clinical onset" of a disease requires the AAT "to identify those symptoms (or features) which, if observed by a clinician, would warrant a conclusion that the patient suffered from" the disease at that time. The Court said:

> "[14] In the present matter I am satisfied that the Tribunal has erred as the parties have agreed. In relation to both alcohol abuse and generalised anxiety disorder the Tribunal did not, in substance, address the question of when the identified symptoms or features of each had manifest themselves and whether they had done so within the requisite period of two years."

Court order on remittal

The parties, however, could not agree on the terms of the order that the Court should make in remitting the matter to the AAT for rehearing. Counsel for the Commission submitted that the matter should be reheard by a differently constituted tribunal and completely redetermined according to law.

Counsel for Mr Parr argued that the order should be more limited, ensuring that the AAT only considers when the clinical onset occurred and whether that occurred within the two year period, and without receiving any further evidence. It was argued that any other approach would potentially expose for reconsideration the AAT's other findings about those diseases.

The Court rejected Mr Parr's submissions and said:

> "[17] In my opinion I should not make an order that, in express terms, constrains what the Tribunal can consider. I should, as commonly occurs, make an order remitting the matter for further hearing and determination by the Tribunal according to law, which reflects a formulation of the order sought by the Commission. However the Tribunal will no doubt be made aware that the error of law alleged by the Commission in its notice of appeal only arose "when [the Tribunal was] determining the time at which the clinical onset of generalised anxiety disorder and alcohol abuse occurred". It will be a matter for the Tribunal, aided by submissions of the parties, to determine the scope of what it can consider having regard to the terms of the order: see *Repatriation Commission v Nation* (1995) 57 FCR 25. The Tribunal may well take the view that it is possible to divorce the question of whether a person suffers from a disease or disorder from the question of when clinical onset of the disease or disorder occurred."

Formal decision

The Court set aside the AAT decision and remitted the matter to be reheard and determined according to law. There was no order as to costs.

Federal Magistrates Court of Australia

Brydon v Repatriation Commission

Baumann FM

[2003] FMCA 299
17 July 2003

Special rate – over 65 provisions – last paid work – drawings from shareholder's account

Mr Brydon lodged an appeal against a decision of the Tribunal that he did not qualify for the Special rate. As he was over the age of 65 when his application for increase in pension was lodged, he was required to satisfy s 24(2A) of the VEA. At issue was whether his "last paid work" was for a continuous period of at least 10 years that began before he turned 65, in terms of s 24(2A)(g).

Mr Brydon was discharged from the Army in 1973 and was then employed as a club manager. He resigned in December 1986 to start a business as the Queensland franchisor for a picture framing business. He and his wife were the sole directors of the company that began trading on 26 July 1987.

In 1993, the company sold the Queensland franchisor rights and Mr Brydon ceased retail selling in 1995. He maintained an involvement with the company on a part time basis. He did not receive a salary from the company after August 1995. In the financial year to 30 June 1996, he received funds from the company, being moneys debited to his shareholders loan account to the extent of $47,237.50, and to 30 June 1997 of $9,951.00.

In applying s 24(2A), the Tribunal found that he had not been working on his own account. It dealt with the matter on the basis that he was a shareholder, director and employee of the company and that it was the company that had carried on the business.

Submissions

Mr Brydon submitted that the Tribunal had erred in concluding that drawings by a shareholder, from a shareholders loan account, cannot be characterised as payment for work. He also submitted that the Tribunal erred in concluding that he ceased paid work in August 1995 or soon thereafter, and yet also concluded that after August 1995 he continued to perform training and advisory services on behalf of the company for the franchisor.

It was submitted that by continuing to receive drawings on his loan account after August 1995, he was continuing to receive "earnings on his own account". This was rejected by the Tribunal, which effectively regarded the test at s 24(2A)(g)(ii) as irrelevant, deciding to consider only his last paid work as an employee.

Court's conclusions

The Court observed that the relevant matters to be determined by the Tribunal when considering s 24(2A)(g) were:

(a) What was the applicant's last paid work? (s 24(2A)(d)).

(b) Was his **"last paid work"** either:

(i) working as an employee of another person (s 24(2A)(g)(i)); or

(ii) working on his own account in any profession, trade, employment, vocation or calling? (s 24(2A)(g)(ii))

(c) If he was an employee, did he work for his employer in that last paid work for a continuous period of 10 years beginning before he turned 65? (s 24(2A)(g))

The Court observed that the benefits received by Mr Brydon from his company after August 1995, being in the form of repayments on his substantial loan accounts (accumulated by payments in establishing the business and not from profits during its operation) and reimbursement of business expenses properly incurred for lunches and travelling, were of an entirely different character to that of a salary. Accordingly, there was no error of law in the Tribunal's findings that the benefits received after August 1995 did not constitute earnings and that he was not "working on his own account".

Formal decision

The Court dismissed Mr Brydon's appeal.

United Nations Human Rights Committee

Young v Australia

No 941/2000

18 September 2003

Mr Young was the partner of a Mr Cains, a veteran who had served during World War 2. After Mr Cains's death, Mr Young applied for a pension under the *Veterans' Entitlements Act 1986*. The Repatriation Commission refused his claim on the basis that he was not the "dependant" of Mr Cains as defined in section 5E(2) of the VEA.

Section 5E(2) provides that:

> "A person is a member of a couple for the purposes of this Act if:
>
> (a) the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or
>
> (b) all of the following conditions are met:
>
> (i) the person is living with a person of the opposite sex …"

The Repatriation Commission's decision was affirmed on review by the Veterans' Review Board. Instead of appealing to the Administrative Appeals Tribunal, Mr Young then took his case to the UN's Human Rights Committee. He argued that Australia's refusal to grant him a pension on the ground that he did not meet the definition of "dependant", for

having been in a same-sex relationship, violated his rights under international law.

Article 26 of the International Covenant on Civil and Political Rights provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Breach of Article 26 of ICCPR

The Human Rights Committee adopted the view that the *Veterans' Entitlements Act* breaches Article 26 of the Covenant, because it does not recognise same-sex relationships. The Committee found that Mr Young was entitled to a reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The Committee added that Australia is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

The Australian Government was given 90 days to respond to the Committee's view.

Ed: The UN Human Rights Committee was established to monitor the implementation of the Covenant and the Protocols to the Covenant on Civil and Political Rights. The Committee is composed of 18 independent experts in the field of human rights.

When a person (whom the Committee calls the 'author') makes a complaint to the Committee concerning an alleged breach of their civil or political rights, and the Committee is satisfied that it is an 'admissible matter' (that is, a matter that the Committee has jurisdiction to consider), the Committee asks the country concerned to explain or clarify the problem and to indicate whether anything has been done to settle it. The country then has 6 months to reply. The author then has an opportunity to comment on the country's reply before the Committee considers the case and expresses its final view, which it sends to the country concerned and to the author.

Unlike a court, the Committee 'adopts a view', rather than delivering a 'judgment' or a 'decision'. The 'views' of the Committee are non-binding, but the relevant country, in this case Australia, is expected to make a written statement to the Committee on its response to the view adopted by the Committee, indicating what, if anything, it has done, or will do about the Committee's recommendations.

More information about the Committee can be found at:

http://www.unhchr.ch/html/menu2/6/hrc.htm

Statements of Principles issued by the Repatriation Medical Authority

September – October 2003

Number of Instrument	Description of Instrument
41 of 2003	Amendment of Statement of Principles (Instrument No.45 of 1997 as amended by Instrument No.74 of 1998) concerning **acute pancreatitis** and death from acute pancreatitis.
42 of 2003	Amendment of Statement of Principles (Instrument No.46 of 1997 as amended by Instrument No.75 of 1998) concerning **acute pancreatitis** and death from acute pancreatitis.
43 of 2003	Amendment of Statement of Principles (Instrument No.11 of 2000) concerning **gout** and death from gout.
44 of 2003	Amendment of Statement of Principles (Instrument No.12 of 2000) concerning **gout** and death from gout.
45 of 2003	Amendment of Statement of Principles (Instrument No.129 of 1995 as amended by Instrument No.183 of 1996) concerning **malignant neoplasm of the endometrium** and death from malignant neoplasm of the endometrium.
46 of 2003	Amendment of Statement of Principles (Instrument No.130 of 1995 as amended by Instrument No.184 of 1996) concerning **malignant neoplasm of the endometrium** and death from malignant neoplasm of the endometrium.
47 of 2003	Amendment of Statement of Principles (Instrument No.3 of 2000) concerning **plantar fasciitis** and death from plantar fasciitis.
48 of 2003	Amendment of Statement of Principles (Instrument No.4 of 2000) concerning **plantar fasciitis** and death from plantar fasciitis.
49 of 2003	Amendment of Statement of Principles (Instrument No.99 of 1996 as amended by Instrument No.185 of 1996 and Instrument No.18 of 2002) concerning **sudden unexplained death**.
50 of 2003	Amendment of Statement of Principles (Instrument No.100 of 1996 as amended by Instrument No.186 of 1996 and Instrument No.19 of 2002) concerning **sudden unexplained death**.

Copies of these instruments can be obtained from:

- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **Repatriation Medical Authority, 4th Floor 127 Creek Street, Brisbane Qld 4000**
- **Department of Veterans' Affairs, PO Box 21, Woden ACT 2606**
- **Department of Veterans' Affairs, 13 Keltie Street, Phillip, ACT 2606**
- **RMA Website: *http://www.rma.gov.au/***

Repatriation Medical Authority

CONDITIONS UNDER INVESTIGATION AS AT 15 OCTOBER 2003

Description of disease or injury	Date gazetted
Acute myeloid leukaemia [Instrument Nos 169/96 & 170/96]	16-07-03
Asbestosis [Instrument Nos 138/96 & 139/96]	16-04-03
Brodie's abscess	05-03-03
Chronic bronchitis & emphysema [Instrument Nos 73/97 & 74/97]	16-04-03
Chronic lymphoid leukaemia [Instrument Nos 67/01 & 68/01]	16-07-03
Dermatomyositis	16-07-03
Diabetes mellitus [Instrument Nos 82/99 & 83/99 as amended by Nos 9, 10, 91 & 92/01]	28-11-01
Endometriosis	16-10-02
Epilepsy [Instrument Nos 79/96 & 80/96]	05-03-03
Gastro-oesophageal reflux disease [Instrument Nos 52/02 & 53/02]	18-12-02
Haemorrhoids [Instrument Nos 13/00 & 14/00]	13-11-02
Hiatus hernia [Instrument Nos 42/99 & 43/99]	14-08-02
Hodgkin's disease [Instrument Nos 25/00 & 26/00]	20-08-03
Inguinal hernia [Instrument Nos 72/98 & 73/98]	16-04-03
Ischaemic heart disease [Instrument Nos 38/99 & 39/99]	28-11-01

Jakob-Creutzfeldt disease [Instrument Nos 63/95 & 64/95 as amended by Nos 190/95, 49/97 & 50/97]	18-12-02
Leptospirosis	05-03-03
Malignant neoplasm of the breast [Instrument Nos 53/97 & 54/97]	16-07-03
Malignant neoplasm of the colorectum [Instrument Nos 58/02 & 59/02]	02-07-03
Malignant neoplasm of the larynx [Instrument Nos 27/95 & 28/95 as amended by Nos 155/95 & 156/95, 151/96 & 152/96 and 193/96 & 194/96]	16-07-03
Malignant neoplasm of the lung [Instrument Nos 35/01 & 36/01]	20-08-03
Malignant neoplasm of the oral cavity or hypopharynx [Instrument Nos 113/96 & 114/96]	06-03-02
Malignant neoplasm of the pancreas [Instrument Nos 55/97 & 56/97 as amended by 20/02 & 21/02]	20-08-03
Malignant neoplasm of the prostate [Instrument Nos 84/99 & 85/99 as amended by Nos 69/02 & 70/02]	16-07-03
Malignant neoplasm of the salivary gland [Instrument Nos 25/97 & 26/97]	06-03-02
Malignant neoplasm of the small intestine [Instrument Nos 153/96 & 154/96 as amended by Nos 7/98 & 8/98]	16-04-03
Malignant neoplasm of the testis and paratesticular tissues [Instrument Nos 3/97 & 4/97]	14-08-02
Malignant neoplasm of the thyroid gland [Instrument Nos 33/98 & 34/98]	16-07-03
Myelodysplastic disorder [Instrument Nos 15/00 & 16/00]	20-08-03
Myeloma [Instrument Nos 72/99 & 73/99]	19-09-01
Neoplasm of the pituitary gland [Instrument Nos 37/97 & 38/97]	13-11-02
Non melanotic malignant neoplasm of the skin [Instrument Nos 43/01 & 44/01 as amended by Nos 51/01 & 52/01]	08-05-02

Osteoarthrosis [Instrument Nos.81/01 & 82/01]	15-10-03
Osteomyelitis	05-03-03
Peripheral neuropathy [Instrument Nos 79/01 & 80/01 as amended by 13/03 & 14/03]	20-08-03
Pleural plaques	11-06-03
Rheumatoid arthritis [Instrument Nos 126/96 & 127/96]	13-11-02
Seborrhoeic dematitis [Instrument Nos 50/99 & 51/99]	16-07-03
Seizures [Instrument Nos 81/96 & 82/96]	05-03-03
Sleep apnoea [Instrument Nos 39/97 & 40/97]	11-06-03
Soft tissue sarcoma [Instrument Nos 23/01 & 24/01]	20-08-03
Spondylolisthesis & spondylolysis [Instrument Nos 15/97 & 16/97]	05-03-03
Tinea [Instrument Nos 27/94 & 28/94 as amended by Nos 184/95, 185/95, 7/02 & 8/02]	29-05-02

Administrative Appeals Tribunal decisions – July to September 2003

Carcinoma

colon
- smoking
  Knight, E (Army) 12 Aug 2003

Circulatory disorder

aortic stenosis
- hypertension
  - salt ingestion
    Lovel, R P (RAAF) 11 Aug 2003

cerebrovascular accident
- aspirin
  Fish, G S (Navy) 17 Jul 2003

hypertension
- alcohol dependence or abuse
  Parrotte, B (Navy) 1 Aug 2003
  - salt ingestion
    Lovel, R P (RAAF) 11 Aug 2003

peripheral vascular disease
- alcohol dependence or abuse
  Parrotte, B (Navy) 1 Aug 2003

Death

carcinoma of prostate
- animal fat consumption
  Mason, L M (RAAF) 22 Sep 2003
- pneumonia as terminal event
  McCarthy, M (Army) 31 Jul 2003

cerebrovascular accident
- experiencing a severe stressor
  - none identified
    Smith, M J (Army) 12 Sep 2003
- panic disorder
  Smith, M J (Army) 12 Sep 2003
- smoking
  Jackson, N (RAAF) 1 Sep 2003

chronic bronchitis
- pneumonia as terminal event
  McCarthy, M (Army) 31 Jul 2003

cirrhosis of the liver
- alcohol dependence or abuse
  Horby, I H (Navy) 30 Sep 2003
  - experiencing a severe stressor
    Ashford, M (RAAF) 12 Aug 2003

diabetes mellitus
- smoking
  Wilson, G (RAAF) 22 Jul 2003

hypertension
- salt ingestion
  Hatchman, I (RAAF) 8 Jul 2003

ischaemic heart disease
- obesity
  Payne, M (RAAF) 2 Sep 2003
- salt ingestion
  Hatchman, I (RAAF) 8 Jul 2003
- smoking
  Wilson, G (RAAF) 22 Jul 2003

metastatic carcinoma
- primary unknown - smoking
  Parkes, M D (Army) 21 Aug 2003

Eligible service

whether veteran or member of the Forces
- part-time service
  Stevens, N M (Army) 4 Jul 2003

Extreme disablement adjustment

lifestyle rating
Janssan, C K 12 Aug 2003

Gastrointestinal disorder

irritable bowel syndrome
- psychiatric condition
  Potter, D (Army) 15 Aug 2003

Hearing disorder

Meniere's disease
- inability to obtain appropriate clinical management
  Rose, L A W (Navy) 27 Aug 2003

Neurological disorder

peripheral neuropathy
- alcohol consumption
  - **Finn, J C** (Navy) 7 Aug 2003
- exposure to pesticides
  - **Lilley, W J** (RAAF) 1 Aug 2003

Osteoarthrosis

knees
- trauma
  - mine explosion
    - **Charlton, A** (Navy) 25 Jul 2003

Psychiatric disorder

alcohol abuse or dependence
- clinical onset within 2 years of stressor
  - **Smith, P** (Navy) 8 Sep 2003
- conflicting evidence
  - **Mines, J W** (Army) 14 July 2003
- experiencing a severe stressor
  - assaulted
    - **Deloryn, G P** (Army) 11 Sep 2003
  - felt responsible for soldier being stabbed
    - **Deloryn, G P** (Army) 11 Sep 2003
  - saw dead body
    - **Deloryn, G P** (Army) 11 Sep 2003
  - Vietnam service
    - **Marshall, W** (Navy) 9 July 2003
    - **McDonald, J D** (Navy) 9 Jul 2003
    - **Taylor, A M** (Navy) 15 Aug 2003
  - Vung Tau harbour
    - **Parrotte, B** (Navy) 1 Aug 2003
    - **Rowling, B L** (Navy) 23 Jul 2003
- inability to obtain appropriate clinical management
  - **Trotter, M** (Navy) 24 Jul 2003
- no diagnosis
  - **Carbis, A D** (Army) 15 Jul 2003
  - **Armstrong, D T** (Army) 25 Jul 2003
- whether due to operational service
  - **Wilson, R T** (Navy) 25 Jul 2003

anxiety disorder
- whether due to operational service
  - **Wilson, R T** (Navy) 25 July 2003
  - **White, P H** (Navy) 23 Sep 2003

depressive disorder
- alcohol dependence
  - **Smith, P** (Navy) 8 Sep 2003
- experiencing a severe stressor
  - Vietnam service
    - **Marshall, W** (Navy) 9 Jul 2003
  - Vung Tau harbour
    - **Rowling, B L** (Navy) 23 Jul 2003

generalised anxiety disorder
- experiencing a severe psychosocial stressor
  - Vietnam service
    - **Potter, D** (Army) 15 Aug 2003
    - **McMillan, D** (Navy) 4 Aug 2003
    - **Taylor, A M** (Navy) 15 Aug 2003
  - Vung Tau harbour
    - **Rafferty, G J** (Navy) 4 Jul 2003
    - **McDonald, D J** (Navy) 1 Aug 2003

post traumatic stress disorder
- alcohol dependence
  - **Blanch, J J** (Navy) 26 Sep 2003
- breach of discipline
  - **Measures, D** (Army) 16 Sep 2003
- conflicting evidence
  - **Mines, J W** (Army) 14 July 2003
- experiencing a severe stressor
  - **Ragg, M** (RAAF) 18 Sep 2003
  - assaulted
    - **Deloryn, G P** (Army) 11 Sep 2003
  - coal mine accident
    - **Delahunty, G** (Navy) 16 Sep 2003
  - felt responsible for soldier being stabbed
    - **Deloryn, G P** (Army) 11 Sep 2003
  - saw dead body
    - **Deloryn, G P** (Army) 11 Sep 2003
  - Vung Tau harbour
    - **Davis, B** (Navy) 17 Jul 2003
    - **Fisher, G L** (Navy) 11 Aug 2003
    - **Parrotte, B** (Navy) 1 Aug 2003

Remunerative work & special rate

Respiratory disorder

Travelling to or from place of duty